Maritime interception and the law of naval operations

A study of legal bases and legal regimes in maritime interception operations, in particular conducted outside the sovereign waters of a State and in the context of international peace and security

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Maritime Interception and The Law of Naval Operations

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Contents

List of Abbreviations

AAV	Approach and assist visits
AFOR	Allied Force
AJIL	American Journal of International law
AMISOM	African Union Mission in Somalia
AMO	Area of maritime operations
AMS	Allied maritime strategy
API	First Additional Protocol to the Geneva Convention (1977)
APII	Second Additional Protocol to the Geneva Convention (1977)
ASEAN	Association of Southeast Asian Nations
BSA	Bilateral ship-boarding agreement
BWC	Biological Weapons Convention
BYBIL	British Yearbook of International Law
ATP	Allied tactical publication
CA 3	Common Article 3 of the Geneva Conventions
CENTCOM	Central command
CHS	Convention on the High Seas
CJA	Council joint action
CMF	Combined maritime forces
CPA	Coalition provisional authority
CTF	Combined taskforce
CPERS	Captured persons
CWC	Chemical Weapons Convention
CYIL	Canadian Yearbook of International Law
DILS	Defence Institute of Legal Studies
DPH	Direct participation in hostilities
ECA	Effective control over an area
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOMOG	ECOWAS monitoring group
ECOWAS	Economic Community of West African States
ECtHR	European Court for Human Rights
EEZ	Exclusive economic zone
EJIL	European Journal of International Law
E-MIO	Expanded maritime interception operations
EU	European Union

EUNAVFOR	European Union naval force
EUMSS	European Union maritime security strategy
GC (I-IV)	Geneva Convention (1949) (I-IV)
GIA	Governor's Island Agreement
GMO	Grondslagen van het maritiem optreden (fundaments of naval operations)
GWOT	Global war on terror
HC	Hague Convention
HRC	Human Rights Commission
Hr. Ms.	Hare Majesteits (Her Majesty)
HSC	High Seas Convention (1958)
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IDF	Israel Defense Forces
IHL	International humanitarian law
IHRL	international human rights law
IHT	international Herald Tribune
ILC	International Law Commission
ILMO	International law of military operations
ILS	International law studies
IRRC	International Review of the Red Cross
IRTC	Internationally recognized transit corridor
ISAF	International Security and Assistance Force
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, unreported, unregulated
IYIL	Israel Yearbook of International Law
LAF	Lebanese Armed Forces
LD	London Declaration
LEDET	Law enforcement detachments
LIO	Leadership interdiction operation
LJIL	Leiden Journal of International Law
LOAC	Law of armed conflict
MDA	Maritime domain awareness
MEO	Maritime embargo operation
MEZ	Maritime exclusion zone
MIF	Maritime interception force
MIO	Maritime interception operation
MNF-I	Multinational Force Iraq
MTF-UNIFIL	Maritime Task Force United Nations Interim Force in Lebanon

MRT	Militair Rechtelijk Tijdschrift (Netherlands Military Law Journal)
MSA	Maritime security awareness
MSO	Maritime security operations
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NGS	Naval gunfire support
NFZ	No fly zone
NILR	Netherlands International Law Review
NJB	Nederlands Juristenblad
NLR	Naval Law Review
NLMARFOR	Netherlands maritime force
NMIOTC	NATO maritime interdiction operations training center
NNN	Non NATO nations
NPT	Non-proliferation treaty
NYIL	Netherlands Yearbook of International Law
NWCR	Naval War College Review
OAE	Operation Active Endeavour
OAP	Operation Allied Protector (I) / Provider (II)
OCD	Operation Change Direction
OCL	Operation Cast Lead
ODIL	Ocean Development and International Law
OEF	Operation Enduring Freedom
OIF	Operation Iraqi Freedom
OOD	Operation Odyssey Dawn
OOS	Operation Ocean Shield
OUP	Operation Unified Protector
PCA	Permanent Court of Arbitration
PICJ	Permanent Court of International Justice
PSI	Proliferation Security Initiative
PSO	Peace support operations
PW	Prisoners of war
Rhib	Rigid hull inflatable boats
RNLN	Royal Netherlands Navy
ROE	Rules of engagement
SAA	State agent authority
SACEUR	Supreme Allied Commander Europe
SC-Res.	Security Council Resolution
SFIR	Stabilization Force Irak
SHADE	Shared awareness and deconfliction (-meeting)
SNMG	Standing NATO maritime group

SRM	San Remo Manual
SUA	Convention on the suppression of unlawful acts at sea
STANAVFORMED	Standing naval forces Mediterranean
STROGOPS	Strait of Gibraltar operations
TFG	Transitional federal government
UK	United Kingdom
UN	United Nations
UNBEF	United Nations blockading and escorting force
UNCLOS	United Nations Convention on the Law of the Sea
UNFICYP	United Nations Force in Cyprus
UNGA	United Nations General Assembly
UNIFIL	United Nations Interim Force in Lebanon
UNMIH	United Nations Mission in Haiti
UNSC	United Nations Security Council
UNSG	United Nations secretary-general
US	United States of America
USS	United States Ship
VJIL	Virginia Journal of International Law
VPD	Vessel protection detachment
WEU	West European Union
WFP	World Food Program
WMD	Weapons of mass destruction
YIHL	Yearbook of International Humanitarian Law
YILC	Yearbook of the International Law Commission
Zr. Ms.	Zijne Majesteits (His Majesty)

PART 1 :
General aspects of maritime interception operations

CHAPTER 1:

Introduction: maritime interception and the law of naval operations

There is no mystery about the war at sea, though like all science and art it can be obscured by skillful elaboration.

Carlyon Bellairs (1871-1955), Commander Royal Navy[1]

1. Introduction

In 2006, on board the Netherlands warship *Hr. Ms. De Zeven Provinciën* operating in Operation *Enduring Freedom*,[2] a USCENTCOM[3] unclassified slide came to my attention which depicted a matrix that contained a number of legal bases for the different maritime interception operations that were conducted by US naval forces around the Arabian Peninsula. Whilst glancing over this matrix my thoughts were that it must really be a challenge for warship commanders to separate all these legal bases and subsequent authorities and apply them to the different situations they could potentially encounter at sea. At that moment, *Hr. Ms. De Zeven Provinciën* was operating in the Indian Ocean. The legal environment at

[1] C. Bellairs, *The battle of Jutland. The sowing and the reaping* (London, Hodder & Stoughton, 1919), 41.

[2] *Hr. Ms. De Zeven Provinciën* was then assigned to Taskforce 150 and operating in operation *Enduring Freedom*. Some states who participate with military forces in operations bring with them their own operation alias. To mention some examples, the Australian contribution to the maritime dimension of OEF was named 'operation Slipper', the Netherlands contribution to the multinational force in Iraq (MNF-I) was named SFIR (Stabilization Force Irak). The UK named its contribution operation TELIC. This thesis will follow the name that is the most familiar and internationally recognized alias, which is usually the US, NATO or EU-name for an operation.

[3] United States Central Command.

that time in the seas around the Arabian Peninsula was a complex situation as a multitude of operations were and had been conducted that had either a maritime dimension or were primarily a naval operation. Many of the conflicts with a maritime dimension in the Middle-East, Near East and Northern Africa come together in these seas; from counter-piracy operations off the coast of Somalia and the Gulf of Aden, to searching for terrorists as a result of the attacks on the United States on the 11th of September 2001. The Persian Gulf and the Red Sea have been a constant theatre for naval operations ever since the Iraq-Iran War (1980-1988), albeit with periodically changing legal frameworks, in step with the changing political situation of conflicts in the region. In the Persian Gulf, over the last twenty-five years warships of many different States have been tasked with a diverse range of operations, ranging from conducting convoy operations to ensure freedom of navigation, to enforcing UN-mandated embargo's, to executing the belligerent right of visit and search during the situations of armed conflict that occurred in the Gulf. In recent years, carrying out maritime security operations has been added to this list. This practice directed my attention to a study of the legal frameworks applicable to maritime interception operations because, in the words of Mark Janis, 'States may use their navies to demonstrate and enforce their perception of the proper law of the sea. If such naval operations are consistent, effective and accepted, customary international law of the sea may develop. But if such naval operations are inconsistent, ineffective, or resisted, chaos may result.'[4]

During the last few decades naval operations that have become known as maritime interception operations (MIO) have grown to become a well-established operational activity for navies all around the world. MIO have firmly established themselves as one of the roles for navies and found its way also to the maritime doctrines of States and international organisations. As Allen states, MIO are: "[A] familiar element in the daily routine of units assigned to the maritime component of combined and joint forces commands in some theaters".[5] Allen writes from a US-perspective, but clearly his observation can be applicable to many other navies. The estab-

[4] M.W. Janis, *Sea power and the law of the sea* (Lexington, 1976), 75.
[5] C.H. Allen,'A Primer on the non-proliferation regime for maritime security operation forces', in *NLR*, vol. 54 (2007), 1-28, 1.

lishment of a NATO training center especially for MIO (The NMIOTC)[6] in Crete, Greece in 2004[7] for States to be able to practice the many different aspects of MIO, from tactics to doctrine, is one of the examples that shows the increased attention to MIO in recent years.[8]

The legal aspects connected to maritime interception operations are manifold and will expand the more one considers maritime interception operations in a broader context. In the widest sense MIO are not a standalone activity at sea, but involve activities in the stage before the actual interception operations at sea and the aftermath of the interception. Examples of legal efforts in the first phase are the establishment of legal frameworks to form partnerships or mutual cooperation, collecting and exchanging information between States and organizations and adopting domestic laws that enable States through their naval forces to act, but also to confiscate UN-embargoed goods, or to enable a court of law to judge on a prize case. All of these activities are connected to the actual boarding operation at sea. Recent counter-piracy operations off the coast of Somalia have highlighted that also the aftermath of interception operations is important to be able to succeed in the overall mission of effectively countering piracy at sea. It has also raised many legal questions, such as what to do with persons and goods once they are intercepted at sea, and in particular firmly established the importance of international human rights law to maritime interception operations. Counter-piracy operations, therefore, have underlined the need to view MIO not solely as a naval activity, but as an activity that needs an interagency approach, with the involvement and cooperation of other governmental agencies, such as the departments of Justice and Foreign Affairs. As Brian Wilson mentions; 'the governance challenge is ensuring the existence of a process to acquire and validate information and align efforts across multiple agencies – or even nations. Effectively countering transnational criminal activities on the high

[6] NATO maritime interdiction operations training center. See homepage at: http://www.nmiotc.gr/#home_en.htm..
[7] G.B. Roberts,'Hostis Humani Generis: The threat of WMD terrorism and how NATO is facing the ultimate threat', in *Defence Against Terrorism Review*, vol. 2, no. 1 (2009), 1-13, at 10.
[8] Within the Royal Netherlands Navy, the importance of boarding operations lead to the establishment of a knowledge center for boarding operations: Kenniscentrum boarding operaties (Knowledgecentre boarding operations), which aims to educate, support and to serve as a centre of excellence for the Royal Netherlands Navy. See *Handboek boarding operaties, Commando Zeestrijdkrachten* (2010) para. 1.1.

seas imposes greater demand for integration.'[9] The core legal issues *at sea,* however, centralize around the notion that maritime interception operations include the boarding of foreign flagged vessels and a possible subsequent capture of ships, goods and detainment of persons. As Chapter 3 will underline, in this respect the term MIO has evolved in such a manner that it has moved away from the view that MIO has a distinct legal framework of its own. Rather, as MIO are nowadays conducted for instance as part of international armed conflicts, during counter-piracy operations or anti-terrorism operations and to implement UN-mandates, today MIO can be based on different legal frameworks.

1.1. Aim, central question and general set-up

This study examines the scope and content of the international law applicable to maritime interception operations. My aim in examining the laws applicable to maritime interception operations is to add to the theoretical academic debate on this topic and to provide warship commanders and other practitioners through a structural analysis of law and practice a better understanding of the legal environment in which maritime interception operations take place. This thesis will study the international law frameworks applicable to naval operations conducting a maritime interception role outside the territorial jurisdiction or functional of a State and within the context of international peace and security. This is analysed by focusing on two main themes of international law in the context of MIO. The first theme is the legal bases for MIO. The second theme relates to legal regimes applicable to MIO. This theme considers three specific activities during a MIO. It will focus on how applicable legal regimes will affect the conduct of visits, the use of force and detention by military forces during maritime interception operations. The two themes to be explored, therefore, divide the analysis of maritime interception operations into a study of legal bases and legal regimes applicable to MIO. The legal basis refers to the legal authority for military to conduct MIO. The legal regime refers to the bodies of international law that regulate the actions taken during an

[9] B. Wilson, 'The complex nature of today's maritime security issues. Why whole-of-government frameworks matter', in J. Krause, S. Bruns, *Routledge Handbook on naval strategy and security* (2016), 153-165, 154.

interception operation, for instance the use of force or the right to detain the vessel or persons found on board.

1.2. Delineations

This study is delineated by three general limitations. First, maritime interception operations will be analysed within the context of international peace and security. Second, the study is limited to operations outside the territorial sovereignity of a State or its functional jurisdiction in coastal areas which posses sovereign rights. Third, the study focuses on contemporary naval operations.

1.2.1. Naval operations and international peace and security

What law applies to MIO can be analysed from different angles of international law. Douglas Guilfoyle's study on *Shipping interdiction and the law of the sea* (2009) has focused on interception from primarily a law enforcement perspective.[10] Guilfoyle has used the term 'maritime policing' to cover a number of subjects that deal with interception on the high seas. These subject are for instance violence against shipping, piracy, smuggling, counter-proliferation, and human food security, which are all 'matters of State security interest'.[11] Natalie Klein's study *Maritime security and the law of the sea* has taken the notion of maritime security as the central matter, in which maritime interception operations play a significant role to enhance maritime security.[12] Another study that needs mentioning here in this context is Efthymios Papastravridis' *The interception of Vessels on the High Seas* (2013).[13] He has taken a more general and theoretical approach to maritime interception, centralizing the area of the high seas from which interception operations are considered.[14] Apart from these monographs, there are many studies that have analysed aspects of the laws applicable to maritime interception from a specific topic, such as the interception of weapons of mass destruction, piracy, armed conflict, or

[10] D. Guilfoyle, *Shipping interdiction and the law of the sea* (Cambridge University Press, 2009).
[11] Guilfoyle (2009), 24.
[12] Klein, *Maritime security and the law of the sea* (Oxford University Press, 2011), 9.
[13] E. Papastavridis, *The interception of vessels on the high seas* (Hart Publishing, 2013).
[14] One study from again a different perspective is Philip Wendel's study, who has partly looked at maritime interception from the perspective of state responsibility. P. Wendel, *State Responsibility for Interferences with the Freedom of Navigation in public international law* (2007).

UN-mandated embargo operations. This thesis focuses on naval operations undertaken by a State in support of international peace and security. The first part of this focus includes the term 'naval operations'. This term is used to focus in particular on operations conducted by the military at sea. Naval operations in the development of international law, as Mark Janis mentions; 'may play a vital role because naval activities are an authoritative and forceful expression of State interest and policy'.[15] The term naval operations is more limited than 'maritime operations' and excludes operations that are executed by State organs outside the military. 'Naval' refers to the use of military forces and assets at sea, whereas "maritime" encompasses also non-military operations at sea by a State, such as coastguard operations[16] or maritime police operations to deal with illegal fishing or customs issues. 'Maritime', therefore, is a broader term which encompasses all activities of a State in relation to the sea. The second part of the focus is 'international peace and security'. What constitutes international peace and security, or a threat or breach thereof, is determined by the UN-Security Council (UNSC) and is not pre-defined. It is, however, interpreted in an extensive manner, not just to include breaches of the prohibition of the use of force in international relations, but also to include serious and widespread violations of human rights or criminal acts that have large effects on the security interests of States.[17] As such, in the last decade the UNSC has determined that acts of terrorism[18] constitute threats to international peace and security[19] and has taken a similar approach with regard to piracy.[20] As a result of the scope of what the UNSC determines

[15] Janis (1976), 77.
[16] Although it is understood that in some states coastguard vessels can belong to the armed forces and may even by deployed expeditionary to theatres of conflict.
[17] N. Blokker, 'The security Council and the use of force – one recent practice ', N. Blokker, N. Schrijver, *The Security Council and the use of force. Theory and reality - A need for a change* (2005), 1-30, 13.
[18] SC-Res. 1368 (2001) notes the following:

> 1. Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security;

But see also SC-Res. 2249 (2015) adopted by the Council after the "Paris 2" terrorist attacks in Paris on 18 November 2015.
[19] Some operations, such as the maritime security operations that are conducted under CTF 152 include a mandate to acts against drug trafficking. It is however not an activity that has been determined by the UNSC as a breach of international peace and security.
[20] Although the piracy resolutions state that action is taken under Chapter VII of the Charter, the UNSC did not, however, explicitly determine piracy to constitute a threat to international peace and

as threats or breaches of international peace and security naval operations have also moved into the realm of operations that can be characterized as law enforcement operations. The law enforcement task for naval forces by itself is not a new phenomenon as, for example, acting against piracy has been a task for warships for centuries and outside the scope of international peace and security naval forces are deployed to intercept illegal activities of drug smuggling or illegal fishing patrols.[21] A Netherlands warship acting against piracy in the North Sea for example would be labelled as maritime policing, whilst that same warship deployed in operation *Atalanta* in the Gulf of Aden would perform its task within the context of international peace and security because the Security Council has determined the situation in Somalia as a threat to peace and security of which piracy is an aggravating factor.[22] Apart from the approach that the UNSC defines international peace and security, the focus on international peace and security in this thesis is viewed in a more general sense to mean subjects that may fall within the scope of international peace and security. Typically, what belongs to the spectrum of upholding or restoring international peace and security are maritime interception operations conducted during peace support operations (PSO) and armed conflicts.

1.2.2. Operations outside the territorial sovereignity of a State

The second limitation is that this thesis will primarily consider the activities of warships outside the territorial sovereignity of a State. This excludes, therefore, the internal and territorial waters of a State. In other words, the study will focus on naval operations on the high seas and the zones to which the regime of the high seas is made applicable. Article 86

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security. It rather continues to determine the situation in Somalia as such, of which piracy is a part of. The first piracy resolution, SC-Res. 1816 (2008), notes the following:

> Determining that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region, Acting under Chapter VII of the Charter of the United Nations.

[21] P.J.J van der Kruit, *Maritime drug interdiction in international law* (2007), Chapter 2.

[22] With regard to types of counter-piracy operations, Zheng has noted two types of international cooperation between states on the issue of piracy; the Malacca-way, which relates to cooperation between coastal states, and the Somali way, which relates to the cooperation between flag states. H. Zheng, 'Confidence building measures and non-traditional security', in P. Dutton, RS. Ross, O. Tunsjo (eds.), *Twenty-First century seapower. Cooperation and conflict at sea* (2012), 298-314, at 304.

of the *United Nations Convention on the Law of the Sea* (UNCLOS)[23] firstly states that the high seas are those parts of sea that are not included in the exclusive economic zone, the territorial sea, the internal waters of a State, or in the archipelagic waters of an archipelagic State.

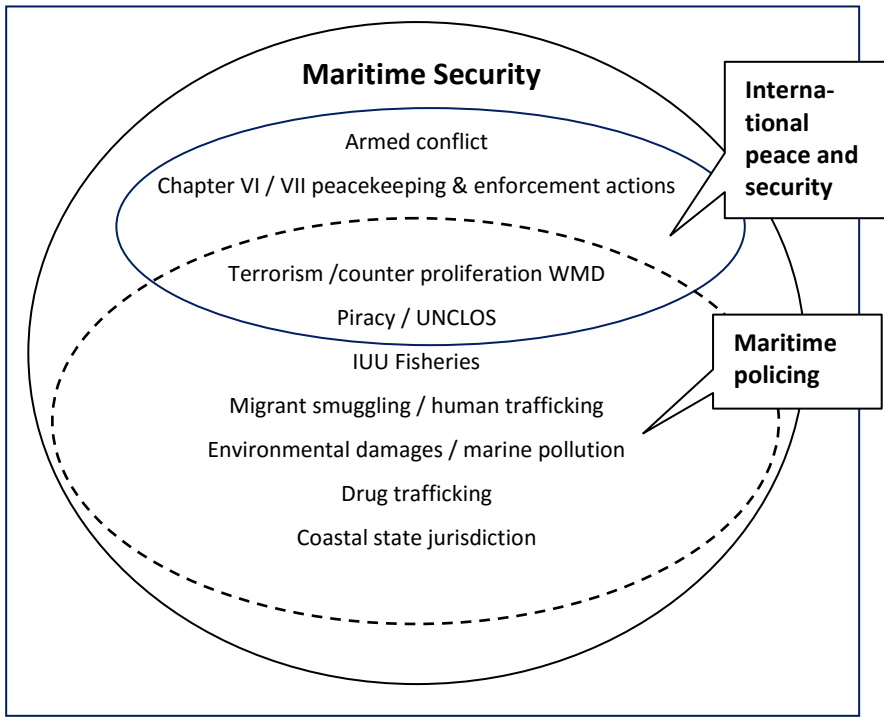

Fig 1.1. Spectrums of maritime security, maritime policing and international peace and security.

UNCLOS furthermore states that a number of rules of the high seas[24] which include the freedoms of the high seas and acting against piracy, also to be applicable in the EEZ of a State under the limiting condition of due regard.[25] The essence of this geographical delineation is that the thesis will not take a coastal State approach and will not consider how coastal

[23] *United Nations Convention on the law of the sea*, Montego Bay 10 December, 1982 (hereafter:UNCLOS).
[24] Articles 88 to 115 UNCLOS.
[25] Art. 58(2) UNCLOS.

States can conduct interception operations in or from their own territory.[26] It will, therefore, not analyse the seaward stretch of a State's jurisdiction and which legal frameworks are applicable in the maritime zones where coastal States have either complete or functional jurisdiction over maritimes zones. Instead, this thesis departs from the perspective of what legal possibilities exist for naval forces to conduct maritime interception operations in the maritime zones outside the jurisdiction of the coastal State.

1.2.3. Contemporary naval operations

The third delineation is a temporal limitation. Maritime interception operations are a current issue of which its historical roots could probably be traced back all the way to Roman or Greek naval history and its laws. Even Julius Caesar experienced his share of piracy in the Mediterranean Sea.[27] 'There was never a time when piracy was not practiced, nor may it cease as long as the nature of mankind remains the same', wrote the -rather prophetical- Roman consul Cassius Dio.[28] Centuries later, in the 16th century,[29] the Knights of St. John were occupied to rid the Mediterranean of Barbarossa's corsairs.[30] Clearly, we must also not forget the interception of the Portuguese vessel *Santa Catharina* in 1603,[31] the boarding and subsequent burning of the *Caroline* in 1837,[32] the fierce hand-to-hand fighting between the boarding party of *HMS Cossack* and the defenders of the German auxiliary vessel *Altmark* in 1940 in Norwegian territorial waters, or the Greek tanker *Joanna V* that ignored the orders to divert after

[26] For example, an interception operation that is conducted outside territorial waters based on a state's right to hot pursuit (see Art. 111 UNCLOS).
[27] Plutarch, *Levensbeschrijvingen van Alexander (den Groote) en Cajus (Julius) Caesar*. (Translated in Dutch by M.B. Mendes da Costa, 1924), 2; Suetonius, *The twelve Caesars* (translated by Robert Graves, 1957), 10; A. Goldsworthy, *Caesar. Life of a colossus* (Yale University Press, New Haven and London, 2006), 75-78.
[28] Referenced from A. Macartney *Shepard, Sea power in ancient history* (William Heinemann LTD, London, 1925), 177. The *Lex Gabina*, promulgated in 67 BC gave Cneius Pompey the possibility to build a large fleet to destroy the piracy threat in the Mediterranean Sea. See on the *Lex Gabina*, appendix E of H.A. Ormerod, *Piracy in the ancient world. An essay in Mediterranean history* (1924).
[29] It is noted here that there is a legal difference between pirates and corsairs (or privateers). The latter, as opposed to the first, are commissioned by a State to raid on the State's enemy. The Declaration of Paris (1856) declared for the signatories that 'privateering is and remains abolished'.
[30] E. Bradford, *The Shield and the Sword. The knights of St John* (1972), chapter 18.
[31] As a result of which Hugo de Groot took up his pen defining the fundamentals of the law of the sea for centuries to come.
[32] Which resulted in the famous *Caroline-criteria* for anticipatory self-defence.

being boarded by the UK warship *HMS Berwick* in 1966,[33] to name just a few interceptions that helped develop international law. However, as Chapter 3 will elaborate, the 'modern' use of the term MIO was only introduced and accepted after the Cold War, during the Iraq-Kuwait crisis in 1990. Logically, since then the term has also spurred authors to look back into history to look for comparable naval operations in the past, such as the naval operations during the Korean War (1950-1953), the Algerian crisis (1954), the India-Pakistan conflict (1974), the Cuban crisis (1961), or the Beira Patrol (1968-1975).[34] This thesis will, however, draw a temporal limitation by starting to follow the path that MIO has taken since the Iraq-Kuwait crisis to the present day. A few situations, however, that have occurred earlier and which cannot be left out of a proper analysis, will be given attention.

1.3. What are maritime interception operations?

While the term MIO is a well-accepted term within the military, there is no internationally and generally accepted definition of what MIO encompasses. Of course many definitions exist in military manuals or other governmental documents, but there is no generally recognized definition. There is not even agreement on what the acronym should stand for. Some refer to *interception* operations and others refer to *interdiction* operations.[35] Nuances may probably be argued to exist between these terms. It may also depend on the underlying subject and the common language used in that particular field of law.[36] Be that as it may, they are usually used in an intermixed manner for the purpose of expressing generally the same thing[37]. This thesis will do the same.

[33] During the Rhodesia crisis, in which the UNSC for the first time used its enforcement powers to authorize a maritime interception operation.
[34] See E.g. H.B. Robertson, Interdiction of Iraqi Maritime Commerce in the 1990-1991 Persian Gulf conflict', in *ODIL*, vol. 22 (1991), 289-299.
[35] Just to name a few examples of several states and international organizations: NATO refers to maritime interdiction operations. The EU appears to use maritime interception, mostly in the context of the refugees at sea issues. The Netherlands Maritime Doctrine (GMO) uses maritime interdiction operations. The UK refers in its *British Maritime Doctrine* (BR 1806, 3rd ed. 2004) to the NATO doctrines and thus refers to interdiction rather than interception.
[36] For instance 'maritime interception' is common language used in the issues of refugees at sea.
[37] E.g. Papastavridis (2013), 60-61; A.E. Carr, *Maritime interdiction operations in support of the counter-terrorism war*, Paper Naval War college (4 February 2002), 3.

To define what MIO are it is important to note from the outset that, as Von Heinegg has very rightly noted, instead of being a legal term, MIO can be considered an operational term of art which encompasses a certain activity at sea.[38] This basically means that the term does not come with a legal framework of its own. In the early days of the use MIO, when such operations were synonymous with maritime embargo operations that are conducted within the legal basis of the UN-collective security system, it was understandable to consider MIO to be a term with a specific legal framework. But as Chapter 3 will underline, today the term MIO is used in a much broader sense. The Royal Netherlands Navy most recent definition on MIO dates from 2014 and considers that the aim of MIO is to stop certain categories of goods or individuals that are in or pass through a certain sea area.[39] In 2005, NATO's main publication on MIO, *Allied Tactical Publication* (ATP) 71, defined MIO as: 'A maritime interdiction operation (MIO) encompasses seaborne enforcement measures to intercept the movement of certain types of designated items into or out of a nation or specific area'[40]. The Dutch definition submits that MIO can include persons. This is one of the important developments in conducting MIO, which will be elaborated upon in Chapter 3. Interestingly, having understood this development, NATO has included persons in its definition when it updated its MIO-publication in 2013. The current version of this publication now reads: 'An operation conducted to enforce prohibition on the movement of specified persons or materials within a defined geographic area'.[41] Several definitions exist in US-documents on MIO. The US-doctrine on command and control in maritime operations (2013)[42] understands MIO to be efforts to monitor, query, and board merchant vessels in international waters to enforce sanctions against other nations such as those in support of United Nations Security Council resolutions (UN-SCRs) and/or prevent the transport of restricted goods. The US *Joint Pub-*

[38] W. Heintschel von Heinegg'Maritime interception/interdiction operations', in *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2010), 375-393, at 375.
[39] GMO (2013), 385. *In Dutch:* Een maritieme interdictie operatie (MIO) is een operatie die wordt uitgevoerd om het transport van bepaalde goederen of personen door of in een bepaald zeegebied te voorkomen.
[40] ATP 71, *Allied maritime interdiction operations* (2005), 1-1. At: http://www.navedu.navy.mi.th/stg/databasestory/data/laukniyom/ship-active/big-country-ship/United-States/ATP/ATP_71.pdf.
[41] ATP 71, *Allied maritime interdiction operations* (2013), 1-1.
[42] Joint publication 3-32 (7 August 2013).

lication (3-03)[43] on interdiction operations defines MIO in a number of ways, essentially, that its purpose is to interdict goods or persons prohibited by a lawful sanction. This may be done on the basis of a UN-resolution, through the use of belligerent visit and search and, according to the US doctrine, pursuant the right of self-defence.[44] As such, apart from the understanding that MIO can now include the interception of both goods and persons, this last remark also points out that different legal bases can apply to MIO.[45]

Some authors reserve the term MIO to naval operations outside the context of operations to which the law of naval warfare is applicable. Others use it in a broader sense, to include both warfare and law enforcement operations.[46] Von Heinegg makes a clear distinction between maritime interception operations that are conducted in the context of the law of naval warfare, and operations that are outside the legal regime of the law of armed conflict: 'It is important to note that MIO are naval operations which are not governed by the law of naval warfare'.[47] 'MIO', he states, 'are measures used in times of peace or of crisis only'. He does not appear, however, to disagree that on an operational level interception operations based on the laws of naval warfare or outside this framework may in some cases not be distinguishable from each other.[48]

The distinction to reserve the term MIO solely for situations outside armed conflict is, apart from it historical evolution, attractive in terms of its clarity. Arguments to define the scope of MIO in a different way, however, also exist. A more expanded view is that as an ultimate consequence of MIO being an operational term of art, this operational art of MIO can also be -and is- used in situations of armed conflict. Secondly, MIO undertaken, for instance, within the context of Chapter VII of the UN-

[43] Joint Publication 3-03 (Joint Interdiction), 14 October 2011.
[44] Joint Publication 3-03, at II-5.
[45] The EU, another actor within the realm of international peace and security, uses the term maritime interception. Although no definition appears to exist, maritime interception within the EU is primarily focused on persons trafficking by sea, such refugees, but also pirates.
[46] See e.g. D. Guilfoyle,'The use of force against pirates', in M. Weller (ed.), *The Oxford Handbook on the international law on the use of force* (2015), 1057-1076), at footnote 44.
[47] Heintschel Von Heinegg (2010), 376.
[48] Allen, for instance, also notes that MIO in US doctrine only applies to situations outside armed conflict (Allen, 2014), but also seems to generalize the term to a broader scope, as he uses the term 'peacetime MIO', to exclude MIO that are conducted under the law of naval warfare. The word "peacetime" is in fact redundant if there was absolute consistency that the term MIO is only used outside armed conflict.

Charter within an *all necessary means*-mandate could factually raise to a level of hostilities against another State where the law of naval warfare may become applicable. Some States argued during operation *Enduring Freedom* that the law of naval warfare applied, to which the term MIO by that time had expanded into. Furthermore, in military practice the term MIO is now used in the widest sense, including peace, crisis *and* armed conflict circumstances, in which possible a boarding operation could take place. This view of a broad use of the term is for instance also underlined in the 2013 *Netherlands Maritime Doctrine* that states that MIO can be conducted in a number of situations, ranging from armed conflict to illegal smuggling of drugs.[49] It is also underlined in the above mentioned US-description on MIO. Operationally, this makes sense, because MIO are an operational tool consisting of a certain activity that tactically does not differ much in how it is performed in armed conflict, crisis or peacetime circumstances. Therefore, there is merit not to focus on a legal divide in which the line of separation is whether or not the law of naval warfare applies, but to take the operational point of view as the starting point, which will lead us to include that MIO can also be conducted within the context of the law of naval warfare. That is, ultimately, the consequence of defining MIO as a term of operational art, rather than legal art. As a last, not wholly legal, argument but which can also not to be completely ignored, is that MIO in 'every day speak' within in the naval, defence and security organizations is simply used to define in general an activity in which the core is to board another vessel for certain purposes. In this context, although admittedly this was different during the early stages of understanding MIO, no military definition of MIO today limits its application to be applied only outside armed conflict. This thesis will take the broad view. As will be elaborated upon in Chapter 2, maritime interception operations should not be mischaracterized as being similar to maritime security operations (MSO). This term is indeed generally accepted to be reserved for naval operations that are outside armed conflict. To sum up, for the purpose of this thesis MIO will be defined as: Naval operations that include the boarding, search and seizure of goods and the detention of persons on a foreign flagged merchant vessel, outside the territorial jurisdiction of a State.

[49] GMO (2013), 386.

1.4. Maritime interception operations and the right of visit

Because the essence of maritime interception operations by warships involves the stopping of goods and persons at sea on foreign flagged vessels, there may be something to say for replacing the broadly taken title of *Maritime interception and the law of naval operations* and replace it by "The right of visit by warships on the high seas". Obviously, much of the literature concerning maritime interception operations takes the approach to analyse MIO from a right of visit perspective. The laws applicable to maritime interception and the right of visit are, however, not completely interchangeable. The different manifestations of the right of visit only partly consider the question concerning legal bases and regimes for maritime interception operations. Whereas a classic right of visit approach could touch upon, for instance, self-defence or an international agreement as a legal basis, and international the law of the sea and the law of naval warfare as applicable legl frameworks, it will not per definition consider other possible applicable legal bases and regimes, such as *ad hoc* consent as a basis or international human rights law (IHRL) as a regime. Although one would logically start by finding the legal framework for MIO within the laws that regulate activities at sea, centralizing maritime interception operations rather than centralizing one specific body of law allows to analyse the applicable law to maritime interception operations through more legal frameworks that might possible regulate MIO.[50] Exchanging the law applicable to MIO for the right of visit, therefore, does not grasp the complete scope of the law that could apply to it.

The law of naval operations with regard to maritime interception is still, however, more limited to, and may be seen as a subcategory of, what is nowadays by some authors described as 'the international law of maritime security'. Kraska and Pedrozo define what they call 'international maritime security law' as: 'legal authorities to counter traditional and conventional threats, as well as irregular and asymmetric dangers against the territorial integrity or political independence of flag, port, coastal and land-locked States'.[51] The scope of the law of naval operations with regard to maritime interception is more limited, because it firstly does not focus on legal authorities that coastal States may have in their maritime

[50] More practically, it helps practitioners to understand the law they need to apply and work with from their point of view.
[51] J. Kraska, P. Pedrozo, *International Maritime Security Law* (2013), 6.

zones, but approaches the law from the perspective of State authorities that warships can execute outside the sovereign territory of a State. It thus, for example, precludes the legal possibilities that States may have to enhance their port security. Secondly, in this thesis the law of maritime interception in naval operations is limited to issues within the context of international peace and security. Maritime *safety* aspects, which is obviously an intimate 'dancing-partner' with *security* in the sense that it aims to minimize danger in the maritime environment, which is part of the broader maritime security law, is not dealt with here.[52]

With others, like Papastavridis, I opine that a separate law of maritime interception operations does not exist. Maritime interception operations are subject to various rules of international law and not a separate category of its own.[53] While on the one hand, as Guilfoyle suggests, 'There may be a law that is generally applicable to how interdictions are conducted and to the consequences of wrongfully conducted interdictions before national tribunals,'[54] on the other hand, the challenges of these various rules when applied specifically to maritime interception may, however, surface a certain uniqueness as to how these rules interrelate. Therefore, there is certainly some merit in bringing together the various rules and areas of international law from the perspective of the law applicable to maritime interception operations.

[52] Aspects of maritime safety are those subjects that deal for instance with construction or equipment of the vessel, the labour conditions under which the crews operate, the manner in which way cargo is being shipped and navigational aspects of sailing a vessel. Maritime safety and security have the common objective of ensuring minimizing all possible dangers for vessel and crew. Maritime safety approaches that objective by trying to minimize accidents, whereas maritime security seeks to minimize the intentional damage or harm to vessel and crews.
[53] Papastavridis (2013), 82.
[54] Guilfoyle, (2009), 344.

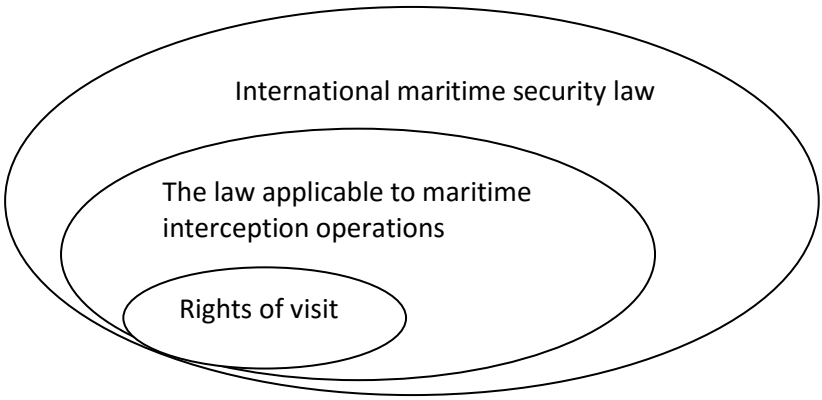

Fig 1.2. Relationship of the rights of visit, the law applicable to maritime interception operations and international maritime security law

1.5. Methodology

The research is a study of available literature, jurisprudence, relevant treaties and customary international law, which includes practice, and general principles of international law on the subject. Maritime interceptions operations will, therefore, be analysed from the traditional sources of international law, enumerated, but not limited to Article 38 of the ICJ-Statute. As mentioned above, it will consider the international law applicable to maritime interception operations via a functional approach, which puts maritime interception operations at the center, rather than a specific area of international law. Furthermore, where it is needed, it will address the context in which maritime operations take place in order to better understand in what unique environment the law needs to be applied.

Doing 'field research' in order to examine military operations on an operational level, and with naval operations in particular, is challenging as it is not a very easy accessible field to research. Much information on the actual policy and legal decisions and rules (of engagement) of military operations is classified and cannot be publicly accessed, nor is there much detailed information published in publicly accessible sources. The sentence one finds in the (Netherlands) mission evaluation reports on for instance the rules of engagement for warships is usually that they were 'clear and sufficed for the mission'. The research is therefore limited to

publicly available literature. Some 'field research', however, is done by means of the fact that as a legal officer in the Royal Netherlands Navy I have participated, or was involved in several operations.[55] Fortunately, the Royal Netherlands Navy has participated in many of the important MIO in the last decades and is part of and actively participates in the international forums relevant to naval operations, such as NATO and the EU. As such, I was able to act like a sort of anthropologist within the group and observe naval operators in their 'original habitat' of the planning cells, the legal and ROE-workshops, and the actual execution of the missions.

1.6. Structure

This thesis is divided into four parts. Part I consists of a general introduction and will start with brief sketch of the context of naval operations to better understand operational environment in which maritime interception operations are used (Chapter 2), and will also address contemporary maritime interception operations by means of a short history of the evolution of the term MIO in four strands (Chapter 3). This chapter will also introduce significant naval operations and incidents that occurred in which MIO has formed a part of the operation.[56] Chapter 4 will consider the two fundamental ground-rules of the international law of the sea as a legal point of departure and which are central to considering the law applicable to maritime interception operations. Part II consists of four chapters and will study the different legal basis for maritime interception operations. The legal bases for MIO can be found in a combination of the generally accepted exceptions on the use of armed force and in the notion of general international law where States can allow other States to conduct activities within their own area of jurisdiction, either by *ad hoc consent* or consent through treaties. Therefore legal bases for maritime interception operations will be analysed: the collective security system, self-defence, *(ad hoc)* consent and international agreements. Part III will examine the legal regimes applicable during maritime interception operations. As such, international human rights law and the law of armed conflict will play a central role in this part. It will do so through the lens of three particular

[55] I had the privilege of participating in OEF, OAE and OUP on the tactical and joint operational level. During my posting as a legal officer of the Netherlands Maritime Force (NLMARFOR) I was able to support the Netherlands maritime contribution to MTF UNIFIL.

[56] A shortlist of vessels and naval operations is provided in annex A and B.

subjects: the right of visit, the use of force and detention at sea. Lastly, part IV will consist of the conclusions and synthesis.

CHAPTER 2

Some introductory remarks on naval operations

2. Introduction

To understand the law applicable to maritime interception operations, one must grasp to a certain extent also the context in which maritime interception operations are undertaken. At least three separate but interwoven strings of evolution have had an effect on maritime interception operations. First is the evolution of the use of maritime power,[57] and more specifically, the role in which naval forces are used by States to pursue their national and international objectives. This evolution shows that MIO have gradually emerged as one of the most important means for States to preserve and protect national and international interests and objectives. Second is the evolution of actual operational practice of naval forces in a maritime interception role. This evolution demonstrates that the scope and purpose of interception operations have experienced changes throughout the last 25 years. And third is the subsequent development of applicable international law in the context of maritime interception operations. Very much in line and in reaction to the operational side, also the legal framework has seen evolution. Obviously, the focus of this thesis is on the legal aspects of MIO, but it is necessary to first briefly state a few remarks on the context of naval operations in general and give an short account of the evolution of maritime interception operations in particular (Chapter 3).

[57] Maritime power in NATO (AJP 3.1. Allied Joint maritime operations para. 1010) is defined as military, political and economic power exerted through the use of the sea, and exercised by sea, air and land resource. It described a state's ability to implement its interests at sea through the use of political, economic and military activities in order to pursuit national objectives. The UK maritime doctrine uses words of a similar kind: 'The ability to project power at sea and from the sea to influ-
iour of people or the course of events'. JDP 0-10 (British Maritime Doctrine), Augustus

2.1. Evolution of the role of naval forces in international peace and security at sea

Up until the end of the Cold War there had been a general idea that the primary focus for naval forces was on the naval fleet of the opponent, in support of a national defence role. This focus, in practice translated for Western navies into a focus on the Russian fleet during the period of the Cold War which, as Staley mentions, was one of the reasons why the UN did not make much use of naval forces.[58] Not that the UN did not use them at all, however. Staley mentions the 'thin record' of naval efforts under the UN-flag (albeit under US-command) during the Korean War as one example. The international security context of the 1990's after the Cold War moved towards cooperation between navies, rather than only within the perspective of a national defence role.[59] In particular, this new security reality pushed the view forward that naval forces could also be used to play a role in implementing international UN-mandates and act within the realm of international peacekeeping, referred to by some as 'naval peacekeeping'.[60] This use of naval forces in peace support operations provided new meaning for the use of naval forces after the Cold War. Seeking to find further purpose, next to this shift it was viewed that naval forces could also play a role in so called *constabulary tasks.*[61] This meant that naval forces could play a role in what are generally considered to be non-military policing tasks in support of minimizing criminal acts at sea, such as drug trafficking, illegal fisheries activities, illegal immigrants, or marine pollution. In a practical sense, the type of operation in which naval forces were used in naval peacekeeping overlapped with constabulary operations. Obviously, not so much in legal basis or authorities, but in the tactical actions that naval forces conducted during peacekeeping operations, very much at the low end of the use of force spectrum. In other

[58] R.S. Staley, *The Wave of the Future: The United Nations and naval peacekeeping* (International Peace Academy, Occasional Paper series, Boulder & London, 1992), 13.
[59] T. Benbow, 'Maritime Power in the 1990-91 Gulf war and the Conflict in the Former Yugoslavia', in A. Dorman, M. Lawrence Smith, M.R.H. Uttley (eds.), *The changing face of maritime power* (1999), 107-125; M. Pugh, J. Ginifer, E. Grove, 'Sea power, security and peacekeeping after the Cold War', in M. Pugh (ed.), *Maritime security and peacekeeping. A framework for United Nations operations* (1998), 10-31.
[60] Pugh (1994); G. Carvalho de Oliviera,'Naval peacekeeping and piracy: Time for a critical debate', in *International peacekeeping*, vol. 19, no 1 (2012), 48-61.
[61] K. Booth, *Law, force and diplomacy at sea* (1985), 192; M.Pugh, F. Gregory,'Maritime constabulary roles for non-military security', in M. Pugh (ed.), *Maritime Security and peacekeeping. A framework for United Nations operations* (Manchester, University Press, Manchester and New York, 1994), 74-101.

words, the New World Order introduced navies to both peacekeeping and maritime policing.

Ten years later, by the time the attacks on the United States in 2001 had occurred, naval forces had firmly established a role in supporting UN-peace support operations from the sea, which they conducted from Iraq to the former-Yugoslavia to Haiti. States also moved to accept a role for naval forces in constabulary tasks, but as maritime strategist Geoffrey Till noted, constabulary operations were; '...regarded something that navies could do when nothing more important was occupying their attention'.[62] The 9/11 attacks and the subsequent focus of fighting maritime terrorism through enhancing maritime security, pushed towards a view for a larger role for naval forces in maritime security, a term without a definition but with ever growing content. Constabulary operations now developed from a peacetime 'nothing else to do' task to one of the important main tasks that navies are called upon to conduct. The notion of maritime security is not at all new, but its scope is, as said, first of all not well defined, and secondly, has expanded in the recent years to encompass more and more issues that are considered a threat to the security interest of States. Natalie Klein has aptly noted that maritime security is usually not defined by defining the term itself, but by stating what can threaten maritime security.[63] Illustratively, the UN-Secretary General, in his 2008 *Report on Oceans and the Law of the Sea*, did exactly that and identified a number of threats that can generally be perceived as threatening maritime security.[64] It lists issues as piracy, armed robbery against ships, terrorist acts, intentional and unlawful damage to the marine environment, illegal dumping and the discharge of pollutants from vessels, and depletion of natural resources, such as from illegal fishing. Although maritime security seems to focus on

[62] G.Till, *Seapower. A guide for the twenty-first century* (3rd ed. Routledge, London and New York, 2013), 305.
[63] Klein (2011), 9.
[64] UN Doc A/63/63, 10 March 2008. Paragraph 131 reads:

> 39. There is no universally accepted definition of the term "maritime security". Much like the concept of "national security", it may differ in meaning, depending on the context and the users. At its narrowest conception, maritime security involves protection from direct threats to the territorial integrity of a State, such as an armed attack from a military vessel. Most definitions also usually include security from crimes at sea, such as piracy, armed robbery against ships, and terrorist acts. However, intentional and unlawful damage to the marine environment, including from illegal dumping and the discharge of pollutants from vessels, and depletion of natural resources, such as from IUU fishing, can also threaten the interests of States, particularly coastal States. Various approaches have been taken to maritime security, depending on the State's perspective of the interests that may be threatened, either directly or indirectly, by activities in the oceans and seas.

law enforcement orientated issues, it is not, however, limited to such matters, but includes the whole range of security matters of a State. This could include also armed conflict. The wide context of maritime security, in which conducting MIO plays an important role to operationalize its enhancement, includes a growing number of security threats that threaten both the exclusive and inclusive good order of the oceans.[65] Because of the globalization in which, using Geoffrey Till's words,'everything is connected to everything',[66] it urges cooperation between States. In this context, the legal means of international agreements have become more important and opportune, as every State has an interest to enhance maritime security for its own good.

Security organizations such as NATO now also started to embrace the notion of maritime security, strengthening the view that countering these threats is also a military, naval, task. So-called maritime security operations (MSO) conducted as an operational result of the focus, has also changed, or rather, broadened the purpose of boarding operations; from stopping and searching for prohibited goods, to include boardings that are conducted to gathering information to support thwarting possible threats against issues of maritime security. Commodore (UK Navy) Neil Brown very broadly defines MSO as 'commonly used to describe the full range of naval operations outside of international armed conflict, including those which include an exercise of rights under Article 110 of the United Nations Convention on the Law of the Sea (UNCLOS)'.[67] It may, arguably, be not the 'full range of naval operations', but it underlines the point that MSO are conducted outside the situation of armed conflict. Using naval forces as means to police the seas also developed tactical level practices such as 'friendly approaches' or 'approach and assist visits' (of which its lawfulness will be discussed in Chapter 7) by warships, which may include stepping onto another vessel to communicate with the fellow seafarer. Such activities have become part of the standing operating procedures within MSO. Navies, therefore, have started to 'police the sea', by means

[65] Maintaining exclusive good order of the oceans relates to issues that could affect the public order of the State, such as illegal immigrants and drug-trafficking. Maintaining the inclusive good order relates to secure the common use and richness of the oceans. Examples are counter-piracy, or illegal fisheries or marine pollution.
[66] Till (2011), 283.
[67] N. Brown, 'Jurisdictional Problems Relating to Non-Flag State Boarding of Suspect Ships in International Waters: A Practitioner's Observations', in R. Ringbom (ed.) *Jurisdiction over ships* (2015), 69-82.

of engaging with the maritime community. The general view is that policing the seas, or in more military terms, enhancing maritime situational awareness (MSA),[68] as one author states: 'adds to warning time' and offers opportunities 'to engage adversaries well before they can cause harm (…)'.[69] Enhancing MSA is seen as the basis to successfully counter maritime threats at sea.[70] The wide context of maritime security and the acceptance that naval forces have a role to play in enhancing maritime security, opens the door more widely to the idea that naval forces should play an active role within the realm of law enforcement. Law enforcement, as Melzer states, refers to the exercise by state agents of police powers.[71] In the naval context, this would for instance occur when naval forces act against piracy. The focus on enhancing maritime security in the first decade of the 21st century also saw this focus translated in newly adopted national and international maritime strategies. Two important naval powers - the US and (the collective of States in) NATO- conceptualized the role for naval forces in maritime security in their maritime strategies. The US released its *National Strategy for Maritime Security* (NSMS)[72] in 2005,[73] NATO finished its new *Alliance Maritime Strategy* (AMS) in January 2011. Both maritime strategies in the first place starkly underline the notion of maritime security and list a number of threats to maritime security.[74] NATO, for the first, time added maritime security as a role its naval forces could play a part in. Also, in March 2014 the European Commission and the High representative of the European Union for Foreign Affairs and Security Policy, adopted a Joint Communication as a pre-step towards an EU maritime strategy: "For an open and secure global mari-

[68] Maritime security awareness (MSA) is the term used by NATO. The US uses the term maritime domain awareness (MDA).
[69] J.M. Krajewski, 'Out of Sight, Out of Mind? A Case for Long Range Identification and Tracking of Vessels on the High Seas', Vol. 56 *NLR* 2008, p. 219.
[70] J.L. Nimmich & D.A. Goward, 'Maritime Domain Awareness: The Key to Maritime Security', in *ILS*, vol. 83 (2007), 57-65.
[71] N. Melzer, 'Conceptual distinction and overlaps between law enforcement and the conduct of hostilities', in T.D. Gill and D. Fleck (eds.), *The Handbook of international law of military operations* (2010), 33-50, 34.
[72] At: http://georgewbush-whitehouse.archives.gov/homeland/maritime-security.html.
[73] C.H. Allen, 'The influence on Sea Power Doctrines: The new maritime strategy and the future of the global legal order', in *ILS*, vol. 84 (2008), 3-3; Kraska & Pedrozo (2013), Chapter 2.
[74] The *NSMS* (2005) mentions: Nation-State threats, terrorist threats, transnational Criminal and piracy threats, environmental destruction and illegal seaborne immigration.

time domain: elements for a European Union maritime security strategy"[75] The EU-document is not a maritime strategy which centers around the role of naval forces in enhancing maritime security, but centers around issues of maritime security itself, in which naval forces within an EU context might play a role.[76] The EU security operations concept (EU MSO), providing an option on how maritime forces can contribute to maritime security. All the documents start from the classic idea that the importance of a focus on maritime security is supported by the view that the freedom of the sea remains of utmost importance for the security interests of States. Baroness Catherine Ashton stated to the Joint Communication that: *'The security and well-being of Europeans greatly depend on open and safe seas. It is therefore necessary for the EU to deal with maritime threats and challenges.'*[77] This was later repeated when the EU Maritime Security Strategy (EUMSS) was adopted in June 2015:

> The Sea is a valuable source of growth and prosperity for the European Union and its citizens. The EU depends on open, protected and secure seas and oceans for economic development, free trade, transport, energy security, tourism and good status of the marine environment.[78]

The freedom of the sea is ensured by protecting it against a wide range of possible threats in which naval forces would play have role to counter them at sea. In the AMS, NATO identified that: *The maintenance of the freedom of navigation, sea-based trade routes, critical infrastructure, energy flows, protection of marine resources and environmental safety are all in Allies' security interests*.[79] But apart from describing the maritime security environment, the AMS does not detail what exactly maritime security for NATO means and simply states that it may act against security

[75] JOIN (2014) 9 final, Brussels, 6.3.2014. *Joint communication to the European Parliament and the council for an open and secure global maritime domain: elements for a European Union maritime security strategy.*

[76] It mentions for instance (at page 7) that the EU should plan, on a regular basis, 'EU-flagged' maritime exercises with third countries in the context of a common security and defense policy operation or EU exercise, in order to improve the visibility of the EU in the global maritime domain.

[77] Press release, European Commission,' Towards an EU integrated approach to global maritime security', Brussels 6 March 2014.

[78] Interestingly enough, the EU has taken a different approach as how to describe the term maritime security in the sense that the term is more defined as an endstate:

> Maritime security is understood as a state of affairs of the global maritime domain, in which international law and national law are enforced, freedom of navigation is guaranteed and citizens, infrastructure, transport, the environment and marine resources are protected.

[79] AMS, paragraph 5.

threats arising in the maritime environment. Derived from NATO's actual maritime operations, next to Article 5 and non-Article 5 peace support operations, currently international terrorism and piracy are the only issues that NATO has expanded to in terms of enhancing maritime security.
Today, therefore, naval forces are expected to operate in many different contexts: Within the context of a national defence and warfighting role, in the context of supporting the maintenance of international peace and security, and in the context of maintaining good order of the oceans. Some even see the role for naval forces even more expanded to include support in humanitarian operations (or: maritime assistance operations, as the Netherlands maritime doctrine categorizes these tasks) to support other States with the effects of natural disasters, like earthquakes and help rebuilding a State after a devastating storm.[80] To summarize and underline the relationship between maritime security and maritime interceptions operations, it is submitted here that enhancing maritime security can manifest itself within the spectrum of armed conflict to collective security to maritime security operations. Maritime interception operations are a means to support the ends in this spectrum. And as noted in Chapter 1, maritime interception operations can be viewed broadly, to include all activities in the broadest sense that relate to the successful execution of maritime interception, and also more narrowly, which focuses on the activities that are performed at sea. The latter is the focus of this study.

2.2. Maritime geography

Naval operations take place in a geographical area that is often called the global commons.[81] As Chapter 4 will underline, the term global commons in legal terms signifies primarily that no one owns it; all States are equally authorized to make use of it and its resources and all have a responsibility to ensure those freedoms. The maritime environment brings with it a number of characteristics which also bear effect on naval operations.

Firstly, States can operate their naval forces in the commons without needing a further legal basis to deploy its forces to sea. This allows, for instance, for early deployment of military assets as contingency position-

[80] J.J. Wirtz, 'Introduction', in J.J. Wirtz, J.A. Larsen, *Naval Peacekeeping and humanitarian operations. Stability from the sea* (2009), 1-13.
[81] E.g. B. Windsor-Smith, 'Securing the commons. Towards NATO's new maritime strategy', in *Research paper, NATO Defense College*, Rome, no. 49 (September 2009).

ing into or close to a theatre of conflict even though the UNSC has not (yet) mandated any military enforcement measures. Those assets can still be tasked with roles, such as monitoring measures that are taken by the UNSC short of military enforcement measures to gather information. Their presence in the area may have an influence on the political course of the conflict. The situation with regard to Libya in early 2011 can serve as an example where States first massed their fleet off the coast of Libya to support national non-combatant evacuation operations and at the same time pre-staged their forces in view of growing tension and subsequent action by the UNSC. Naval forces were on station to immediately start enforcement action against Libya when the UNSC authorized States to do so. Further back in history, NATO launched *Maritime Monitor* to monitor the implementation of UN-sanctions without the existence of an explicit enforcement mandate, but to support the UN in its efforts to deal with the conflict.

Secondly, operating in the global commons means that naval operations will occur in areas where other States' vessels have a freedom to navigate and make use of the ocean as they wish. Most of that use is economy-related. Naval operations can on the one hand support these activities by protecting the sea lanes of communication and by taking away the threats of criminal activity at sea, but it can also hamper the economy when, for instance, embargo operations or the existence of armed conflict allows interference with foreign flagged merchant vessels. The point to note, however, is that maritime interception operations include the military application of force that is generally not directly against the military opponent. Instead, MIO include mostly the stopping of merchant vessels, for instance to check their neutral status, whether an embargo is being breached, to keep vessels in- or outside a targeted State, or to arrest criminals at sea. Maritime interception may be part of a military campaign which can also consist of naval forces that both conduct hostilities and perform interception operations, but its addressee is primarily non-military persons. To put it in terminology of the law of armed conflict, MIO will deal mainly with civilians.

Operating in the global commons means, thirdly, that there is a possibility that navies could take up the task of policing the high seas. Basically, maritime security operations (MSO) that are conducted by standing multinational fleets, such as Combined Maritime Forces (CMF) or

NATO's SNMG's[82], to enhance maritime security at sea in general, are typically actions that would be considered as policing the seas. Although MSO, or policing the high seas to use the latter term, may be at the political-strategic level the way forward, conceptually, it does not sit well with the basic framework upon which the international law of the sea is built. This issue will be touched upon in Chapter 4. Be that as it may, maritime security on an operational level is viewed to be largely based on two legs. First is the increase of awareness of what happens at sea and second is to take action against threats. In both legs maritime interception operations play a role. In the first, by means of approaches of warships to other vessels to gather and exchange information adds to the maritime awareness. In the second, MIO are used to actually act against the threat.

A fourth point to note on the maritime geography and maritime interception operations is that naval operations with different legal basis and regimes may overlap each other in one geographical area. For example, when operation *Iraqi Freedom* (OIF) started in 2003, US forces were allowed to board suspect vessel as far away as the Mediterranean Sea, quite some distance away from the operational theatre in the Persian Gulf. At the same time, also NATO's operation *Active Endeavour* operated in the Mediterranean Sea, but different authorities were given to the participating warships. States can assign their warships to different ongoing operations in one area, which will lead to the complexity that warships from the same State operating in the same area, could theoretically have a different legal basis and authorities under which they perform their task. Or, one warship could be assigned to take part in more operations in one area. It is quite understandable, therefore, that merchant vessels that are stopped will also have a challenge to understand what the actual legal scope of the boarding could be.

The fifth and last point to note is that it appears that the different applicable frameworks of international law are sometimes viewed as a toolbox. In this view international law provides choices to a commander. If a vessel for example cannot be boarded because there is no reasonable suspicion that it has breached a UN-embargo, if opportune, it may switch to the legal basis of statelessness or use *ad hoc* consent as the basis to board the same vessel. While the legal toolbox is a welcomed instrument for a warship commander, the danger is that the toolbox is used in a too

[82] Standing NATO maritime groups.

creative manner in which for instance a legal basis is misused to achieve something else than what it is meant for. Creative use might, theoretically, increase where the parameters of a visit are not detailed, such as *ad hoc* consent or statelessness as a ground for boarding a vessel.

2.3. Maritime coalition operations

Maritime interception operations in the context of international peace and security are generally conducted as a multinational effort by a coalition of States. In terms of command structure, multinational operations can either be performed as a 'loose' coalition of individual States that form a coalition in a specific conflict, usually operationally led by a leading State, or under the command structure of an international organization, such as the UN, NATO or the EU. The choice of command structure will firstly have effect on the procedure in which way authorities are given to the participating warships, and can secondly have effect on the actual authorities itself. This is because of the fact that different organizations will work from their own political and legal perspective and will interpret and fulfill an authorizing mandate against the background of that perspective.[83] For example, authorities for warships operating in the counter-piracy operations in EU or NATO differ, although the overall UNCLOS and additional UNSC-mandate are the same for both organizations. States participating in multinational operations may also, in their own procedural manner, differ within the coalition on authority given to warships. This makes it difficult to determine exactly what kind of authorities participating warships within a certain operation may have. It is, therefore, not automatically said that one can take as a point of departure that all participating warships in one operation will have the same authorities.[84] How much it differs, depends also on the way the commanding organization allows for any differences in authorities. During the coalition operation *Enduring Freedom* the authorities -or rules of engagement (ROE)- differed between participating nations.[85] As such, the legal regime used for boarding operations in

[83] See on the coalition challenges of ROE, D. Stephens, Coalition warfare – challenges and opportunities', in *IYHR*, vol. 36 (2006), 17-27.
[84] To overcome the multitude of authorities multinational commanders are usually forced to make all kinds of matrices in which states are asked to define their authorities or caveats for a specific operation.
[85] M. Houben, 'Making Waves and Building Bridges: Dutch Experiences in the Arabian Sea', in *RUSI Defence system* (June 2007), 82-85.

OEF is rather diffuse. As a last, different operations can also exist based on one legal basis. For example SC-Res. 1973 with regard to Libya prompted the coalition-operation *Odyssey Dawn*, the NATO-operation *Unified Protector* (OUP) and individual operations conducted by States. Where MIO are conducted in the context of law enforcement, maritime interception also asks for 'coalitions', in a number of others ways. As was underlined above, in the first place there is the view that enhancing maritime security in a globalized world means working together between States and organizations that have a specific focus on areas that coincide with issues of maritime security. On an operational level, it also needs coalitions between the military and other relevant government agencies, as the aftermath of an interception at sea is of equal importance as the interception itself to be successful in the overall mission.

2.4. Boarding operations

Warships' crews are trained to perform a number of roles, one of which is to perform boarding operations. Usually, the boarding-team will either consist of the warships' crew that is appointed a secondary task in the boarding-team, or added personnel will be attached to the warships' crew to perform the boarding-operations. The latter will be opportune when situations occur in which the boardings are the primary task within the operation and the use of the original warships' crew will put a strain on operating the warship itself, or when there is a chance that greater coercion and a higher level of force is needed to board a vessel for which specifically trained personnel may be needed.[86] For example, in cases of opposed boardings and in situations where personnel with specific legal authorities are needed which are not invested in military personnel. Military personnel may have authority to board a vessel when the boarding is based on a UN-resolution, but may not have authority when the boarding is part of stopping a criminal act at sea. With regard to the US naval forces Ivan Luke, for instance, explains that the US Coast Guard (USCG) has statutory law enforcement authority, whereas the US Navy does not.[87]

[86] A Dutch shipboarding team will generally be trained to the level of conducting non-cooperative boardings.
[87] I. T. Luke, 'Naval operations in peacetime. Not just "warfare lite" ', in *NWCR*, vol. 66 no. 2 (spring 2013), 11-26.

The boarding of another vessel can be done in a number of ways, but is generally done through sending a boarding-team either on small boats (rhibs)[88] to the target vessel, or insert the boarding-team by helicopter on the deck of the vessel to be boarded. The boarding-team itself will generally consist of a security (or guard) team, a search team and a bridge team. The first team deals with force protection, the second to inspect the vessel and the third to stay in contact with the master and exert control over the vessel. The organization of the boarding-team, however, also depends on the actual circumstances of the case, such as available personnel and whether the situation might be threatening, or is a routine friendly approach-boarding.

2.5. Maritime rules of engagement

In current naval operations, it is unusual if the authorities of the warships' crews during an operation are not laid down in so called rules of engagement (ROE). ROE regulate the use of force during military operations in the broadest sense and are based on a combination of legal, political and operational factors that need to be considered for a particular military campaign. Force in terms of ROE can either be the actual use of weapons, but also the threatening or de-escalating positioning of warships relative to the opponent or a State, the detention or seizure of persons and goods, or the boarding of foreign flagged vessels. There are also ROE that are typically used in the maritime dimension. In very general terms, for instance, to stop another vessel a warship can use warnings, graduated use of force against the vessel, boarding the vessel and subsequently seizing the vessel, goods and or persons and ultimately sailing the vessel to a port. Typical for maritime ROE are rules on positioning,[89] warnings(shots), (non-)disabling fire, boarding and diversion.[90] With regard to boarding ROE, from a tactical perspective, boarding operations can be divided into three levels. They can either be unopposed, non-cooperative or opposed.[91]

[88] Rigid hull inflatable boats (rhibs).
[89] Positioning of naval vessels relates either to the geographical positioning of a warship, or the positioning of warship in relation to other vessels in the maritime area.
[90] Diversion relates to authority to divert a vessel off its original course, for instance to divert it from an area that is restricted by UN-mandate or where diversion of the vessel is needed to send it in-port for further inspection.
[91] See M. Houben, *Food for Life. De inzet van Hr. Ms. Evertsen ter ondersteuning van het VN Wereldvoedsel programma*. Working Paper Maritiem optreden nr. 1, Maritieme Doctrine en Tactieken Centrum (2008), 32.

These levels relate to the level of physical cooperation a boarding team can expect from the master and crew of the target vessel. In an un-opposed situation the master of the vessel will cooperate with the boarding party in all aspects of the boarding-process. In a non-cooperative situation the master does neither comply nor obey given orders. This may result in passive resistance, such as not stopping the vessel or not answering the warships orders. In an opposed situation, it is expected that the master will actively oppose the boarding, which may include the use of force against the boarding party.[92] The Israeli boarding of the *Mavi Marmara*, for instance, is exemplary of a boarding that was clearly opposed by a number of persons on board the target vessel.

The level of physical cooperation of the master must be distinct from the legal basis to board a vessel, which is usually expressed in terms of either consensual or non-consensual boarding. A consensual boarding exists where the flag State has consented to the boarding of its vessel.[93] When taking these legal and operational circumstances together, a boarding can thus be for example consensual but opposed in the situation where the flag State has consented to the boarding but the master actively refuses to be boarded. This occurred for instance during the *MV Light* incident.[94] The issue of consent obviously does not appear in cases where a legal basis exists that allows the boarding of foreign flagged vessel, such as in cases where the UNSC has explicitly authorized the inspection of vessels, the belligerent right of visit applies, or where a treaty has authorized a boarding. In such cases, the ROE will only have to refer to the physical part of the boarding.

Diversion relates to an activity to divert a vessel off its original course, for instance to divert it away from a maritime area that is restricted by UN-mandate, or where diversion of the vessel is needed to send it in-port for further inspection. In many situations, diversion may be the better alternative to boarding and inspection at sea. For one reason, within the context

[92] See also Papastavridis (2013), 67. The terminology is now quite settled part of naval (NATO) doctrine. Before, the terminology differed and the term (non-)compliant was also used. During the NATO and EU embargo operations in the Adriatic Sea and in the beginning of operation *Active Endeavour* the term compliant instead of consensual appears. In any case, the term compliant also refers to the physical levels of force that that may be expected against the boarding party.
[93] But see discussion on this point in Chapter 7.
[94] See Chapter 3 on this incident.

of UN-mandated embargo operations, because, and apart from the many practical challenges that arise with boarding and inspection,[95] the mandate is also be successfully upheld when ships with suspicious cargo do not arrive at the port of the State under sanctions.

Disabling and non-disabling fire relates to activity of using actual force against a ship by means of the use of weapons. This ROE-authority aims at coercing the vessel to stop and obey the apprehending warships' orders and is usually meant as another gradual step in a warning cycle against a vessel. Non-disabling will allow firing into parts of the ship that are not essential for navigational purposes. Disabling-fire will allow for aiming at parts of the vessel that will effect operating the vessel without endangering its seaworthiness. For instance, firing at the engine of a small boat. What part of the vessel can be targeted obviously depends on factors such as the type of available weapons, the type of the targeted vessel and the whereabouts of the people on board the vessel.

Depending on the command structure and the national political and legal guidelines warship commanders receive from their capitals, it is possible that naval forces in one and the same multinational operation may have different ROE. It must also be understood that, as mentioned earlier, ROE are not a legal regime, but a result of policy, legal and operational factors. Because of this combination of factors that weigh into the ROE, they may be more restrictive due to political or operational reasons than what is allowed on an extant legal regime. For example, a reason why a boarding may not be authorized even though there are legal grounds available, is due to a lack of specialized forces that can perform an opposed boarding. What is, therefore, important to note is that although the authorities (ROE) that warship commanders obtain to do their mission are a good indicator of the applicable law, it may not be the same as a reflection of the law itself.

[95] Such as having to understand whether paperwork may or may not be falsified. This was one of the challenges during the Red Sea interception operations of the MIF. See Pokrant, *Desert Shield at Sea. What the Navy really did* (1999), 189-192.

CHAPTER 3

A short history of maritime interception operations

There is no point in getting into the semantics; what matters is that the oil is being stopped

-Alleged quote by former US-president George Bush sr.[96]

3. Introduction

Different authors suggest that it may have been the US-Secretary of State James A. Baker[97] that coined the term interception operations in its modern understanding during the early stages of the Iraq-Kuwait conflict in 1990.[98] Apparently he did so, according to Pokrant, to avoid 'the words 'blockade' or 'quarantine', because under international law those terms can be interpreted as acts of war', which were viewed to be inappropriate terminology at the time when the New World Order was trying to do away with the Cold War'.[99] Whether Baker, or maybe one of his legal or political advisors, is the actual founding father of the term interception operations may not be precisely traceable in history.[100] But what matters, how-

[96] J.J. Olson, 'Naval Interdiction Considerations in the Use of Limited Naval Force In Operations Short of War', in *Paper submitted to the Naval War College* (1993), 3.
[97] US-Secretary of State between 1989 and 1992.
[98] L. Freedman, E. Karsh, *The Gulf conflict 1990-1991. Diplomacy and war in the new world order* (1993), 144-145; R.E. Morabito,'Maritime interdiction: Evolution of a strategy', in *ODIL*, vol. 22 (1991); D.L. Peace, Major maritime events in the Gulf', in *VJIL*, vol. 31 (1991), 545-566, 561; C.H. Allen, *Maritime Counter proliferation Operations and the Rule of Law* (2007), 84.
[99] Pokrant, 29; Morabito, 307.
[100] Pokrant mentions that the General Colin Powell (then Chairman of the Joint chiefs of staff) in August 1990 first issued orders for the Maritime *quarantine* force to begin operations, but soon after issued new orders which replaced the words quarantine with 'interception' and the name of the operation to Maritime Interception Force. Pokrant, 29.

ever, is that the term stuck and has since then become an accepted and much used acronym -MIO- in naval operations.

During the Iraq-Kuwait conflict, and through the conflicts that followed shortly after Iraq, such as the Former Yugoslavia and the crisis in Haiti, maritime interception operations became one of the means that the UNSC resorted to in order to restore international peace and security. Currently, MIO in all its different forms and shapes are conducted all over the world, for instance in the form of counter-piracy operations off the coast of Somalia and the Arabian Sea, as part of a friendly approach during maritime security operations, or as part of UN-mandated military operations in the Mediterranean Sea against Libya, that ultimately ousted Qaddafi. Today, the term MIO is not solely reserved for maritime operations that aim to enforce economic sanctions at sea adopted by the UNSC, as it has been the view for quite some years. On the contrary; its use in recent history shows an evolution that has significantly widened the use of the term. Naval strategist Milan Vego has noted that apart from UN-mandated economic enforcement measures; "MIOs can also be applied by a major naval power or group of powers to prevent maritime terrorism or illicit trafficking in narcotics, humans, and weapons".[101] Also, for example, the NMIOTC notes that MIO must be seen from a perspective in which the term is connected with, *inter alia*, counter-terrorism, piracy and counter-proliferation of weapons of mass destruction. Furthermore, in an even more expanded view, the term MIO has also been used in naval operations that have based their boardings on the law of naval warfare. In fact, during the very first use of the term in the 1990 Iraq-Kuwait crisis, it was the belligerent authority the US-led coalition used under the mask of MIO, which then ultimately transformed into UN-mandated operations.

3.1. Four strands of evolution

The evolution of the use of the term MIO can largely be sketched along the lines of four strands. First is the continued use by the UNSC of the tool of maritime embargo operations (MEO) to enforce economic sanctions at sea. The second and third strand starts with a changed security situation that came about after 9/11. As a reaction to the terrorist attacks

[101] M.N. Vego,'On Naval Power', in *Joint Force Quarterly*, issue 50, 3rd quarter (2008), 8-17, at 11.

on the United States, a number of States undertook to deploy warships to interdict terrorists that would make use of the sea. The 9/11 events also proved to be the start of several initiatives that shifted the use of naval forces more and more to naval activities under the umbrella of an expanded view of the notion of maritime security. The fourth and last strand of evolution started when the UNSC adopted SC- Resolution 1816 (2008), which signals the beginning of an active engagement of the Council and its member States in the fight against piracy and the protection of international trade in the Gulf of Aden and in the Somali basin. These strands are not alternative in the sense that one usage of the term MIO has taken over from the other. Rather, it has broadened the different ways in which way the term MIO is now used. This chapter introduces these four strands, the naval operations that were conducted in the context of these strands, and the relevant incidents that occurred in relation to each of them.

3.1.1. Strand 1: Enforcing UN Sanctions at sea

Charron notes that the number of sanctions imposed by the UNSC jumped from two (Southern-Rhodesia (1966-1979) and South-Africa (1977))[102] during the Cold War to fourteen immediately after the Cold War, rising to a total of 27 in 2010.[103] Since then, the UNSC has continued to utilize the means of sanctions on a regular basis. Only a limited number have also included a naval enforcement dimension at sea. Already during the Cold War naval forces were used as a means to enforce the UN sanctions. During the Southern-Rhodesia crisis the UNSC in resolution 216 (1965) condemned Ian Smith's unilateral declaration of independence of Southern Rhodesia. After the *Joanna V* incident,[104] the UNSC, through subsequent resolutions, authorized the former colonial power, Great Britain, to take action and interdict oil tankers going into the port of Beira. This was the

[102] V. Gowland-Debbas, Sanctions regimes under Article 41 of the UN Charter', in V. Gowland-Debbas (ed.) *National implementation of UN Sanctions* (Kluwer Law International, The Hague, London, Boston, 2004), 3-31.
[103] A. Charron, *UN Sanctions and conflict. Responding to peace and security threats* (2011), 5-6.
[104] O'Connell mentions that the Greek tanker *Joanna V* was boarded by the UK warship *H.M.S. Berwick* on 4 April 1966, after which it refused to divert from the port of Beira, without the UK being able to do something about it. After the incident the UNSC took measures that involved the authority to arrest the *Joanna V* upon departure and to stop vessels breaching the embargo going into Beira. D.P. O'Connell, *The influence of law on sea power* (1975), 174-175.

start of the so called *Beira Patrol*, which lasted until 1975.[105] The decision back then by the UNSC to authorize a State to stop oil tankers, is often seen as enforcing UN sanctions through a maritime embargo operation *avant la lettre*. After the Cold War, the UNSC started to use the naval dimension more frequently as an asset to enforce UN-sanctions. Sanctions that came immediately after the end of the Cold War which had a maritime dimension included Iraq, the Former-Yugoslavia, Haiti and Sierra Leone. Since the start of the 21st century the UNSC has resorted twice to the use of naval forces as a means to enforce UN-sanctions: Lebanon (2006) and Libya (2011). Including the Beira Patrol, to date seven naval operations have taken place to enforce economic measures at sea. A short description of these operations is given in the following paragraphs.

3.1.1.1. Iraq (1990-2003)

The Iraqi invasion of Kuwait started on 2 August 1990, at 01:00hrs.[106] The UNSC responded quickly that same day with the adoption of SC-Res. 660 (1990). In line with Article 39 of the UN-Charter the UNSC determined that the Iraqi invasion was a breach of international peace and security and demanded an immediate withdrawal of Iraqi forces. No mention was, however, made at that stage of the crisis of Article 51 of the UN-Charter. The affirmation that the situation was indeed considered to be a situation of self-defence followed four days later, on 6 August, when the Council adopted UNSC-res. 661 (1990).[107] In addition to this legal determination of the conflict, the UNSC also imposed a trade embargo on the import into the territories of all member nations of all the commodities and products originating in Iraq or Kuwait.[108] The US and UK that came to the assistance of Kuwait started maritime interception operations on 16 August 1990. The Chinese freighter *Heng Chung Hai* was the first vessel boarded by the *USS England* and released again after inspection.[109] With both the UN and individual States acting at the same time, at this stage the first

[105] See on this operation, R. Mobley, 'The Beira Patrol. Britain's Broken Blockade', 55 *NWCR* (2002), 64-84

[106] Freedman and Karsh, 67.

[107] The preamble of SC-Resolution 661(1990) notes:

> affirming the inherent right of individual or collective self-defence, response to the armed attack by Iraq against Kuwait, in accordance with article 51 of the Charter.

[108] SC-Res. 661, para 2(a).

[109] Pokrant, 32.

discussions on the legal basis with regard to MIO took place. [110] On August 25, the UNSC adopted SC-Res. 665 (1990). It was then accepted that the UNSC had authorized seaborne enforcement of the earlier adopted UN-sanctions. During the period between 16 and 25 August in which US naval assets deployed to stop commerce, only two vessels were diverted, of which only one was boarded.[111] States that had deployed their warships to the Persian Gulf and to other parts around the Arabian Peninsula now started to enforce UN-economic sanctions against Iraq in a multinational coalition operation. The participating warships that enforced the UN-sanctions were dubbed to be part of the *Maritime Interception Force* (MIF). The inspection area for the MIF ran from the Persian Gulf, to the Indian Ocean, to the Northern Red Sea, to Gulf of Aqaba, but was over time limited to the Persian Gulf and the Indian Ocean.[112] The MIF-operations lasted not less than thirteen years, until 2003, when the UNSC adopted SC-Res. 1483, in May 2003, taken in light of the new situation in Iraq. In March 2003, the military forces of a US-led coalition had entered Iraq to oust Saddam from its reign and to search for possible weapons of mass destruction.

3.1.1.2. The Former Yugoslavia (1992-1996)

The breakup of the Former Yugoslavia in the beginning of the 1990's continued breathing life into the maritime interception model that was set up by the MIF. While Yugoslavia was falling apart, in 1991 the UNSC adopted SC-Res. 713 (1991) under Article 41, establishing an arms embargo. The adoption of SC-Res. 757 (1992) in May 1992, which put Yugoslavia under a general export embargo of 'all commodities and products originating from the Federal Republic of Yugoslavia (Serbia and Montenegro),[113] prompted both NATO and WEU into examining the question whether the organizations could support the UN decisions by means of

[110]See on this debate Chapter 6, paragraph 6.2.1. See also T.D. Gill, 'De Golf crisis. De volkenrechtelijke regels inzake het gebruik van militair geweld', in *NJB* vol. 38 (1990), 1475-1487.
[111] Robertson, 295. Marolda and Schneller (p. 86) mention only the boarding of Chinese freighter, the *Heng Chung Hai*.
[112] Sarah Graham-Brown states that the MIF stopped inspections in the Gulf of Aqaba in 1994 when Lloyds in Jordan started landbased inspections of cargo bound for Iraq. S.Graham-Brown, *Sanctioning Saddam. The politics of Intervention in Iraq* (London, New York, 1999), 96 note 43. See also, T.P. Shaw, 'Arabian Gulf maritime interception operations: balancing the ends, ways, means and risks', *Paper Naval War College* (1999), 1-16, 2.
[113] SC-Res. 757 (1992), para. 4a.

maritime peacekeeping operations. For NATO, this was a landmark question because it meant that NATO would be extending its purpose from its primary role of a collective self-defence to so called 'out of area' activities. NATO ultimately defined its additional role to collective self-defence during the Oslo Summit in June 1992, in which it stated in its final communiqué[114]: '…we are prepared to support, on a case-by-case basis in accordance with our own procedures, *peacekeeping activities* [emphasis MDF] under the responsibility of the CSCE,[115] including by making available Alliance's resources and expertise.'[116]

On 16 July 1992, NATO launched operation *Maritime Monitor*, which was the first 'out of area', or so called non-Article 5 operation, it ever conducted, albeit very close to the borders of the Alliance territory. It was also the first real naval *operation* NATO ever started.[117] Alongside NATO, the WEU launched operation *Sharp Vigilance*. After the adoption of SC-Res. 787 in November 1992, in which the UNSC explicitly authorized naval enforcement of an arms embargo at sea, NATO and the WEU changed their operations names into *Maritime Guard* and *Sharp Fence*. Both operations were later in 1993, after the adoption of SC-Res. 820 combined into one: operation *Sharp Guard* (CTF 440). The operation was suspended in June 1996 and terminated on 1 October 1996, after the adoption of SC-Res. 1074 (1996). This resolution ended, after five years, all sanctions against the Former-Yugoslavia. During *Sharp Guard*, in 1994, also the *Lido II* incident occurred:

> The *Lido II* incident involved a Maltese flagged vessel that in April 1994 left the Tunisia to sail for Croatia, with mainly petrol products as its cargo. After a first inspection by the NATO/WEU forces while entering the Adriatic it proceeded on its way to Croatia. The *Lido II* however changed course to the Albanian port of Durazzo, while repeating requests for assistance as the vessel started to take water into the engine room (which later turned to be untrue). The master then changed course again towards Montenegro, which was off limits under the SC-Res. 820 mandate. At the same time Serbian patrol boats came out to meet the *Lido II*. Dutch forces from *Hr.Ms. Van Kinsbergen* who were also on scene were inserted by helicopter to take control of the vessel before it entered the territorial

[114] See on the development that lead to this decision Giovanna Bono,'NATO's 'peace enforcement' tasks and 'policy community': 1990-1999 (Ashgate, 2003), Chapter 2.
[115] Conference on Security and Cooperation in Europe. In 1995 the CSCE transformed into the (nowadays better known) OSCE (Organization for Security and Co-operation in Europe).
[116] Ministerial Meeting of the North Atlantic Council in Oslo, 4 June 1992, para 11.
[117] D.A. Ruiz Palmer, 'A maritime renaissance. Naval power in NATO's future', in J. Krause, S. Bruns, *Routledge Handbook on naval strategy and security* (2016), 364-380, 371.

> waters of Montenegro. The *Lido II* was towed to Brindisi, Italy, to be dealt with by the Italian authorities.[118]

Although NATO and the EU were to get more and more militarily involved in the crises in the Balkans, which included also Kosovo from 1999 onwards, after 1996 no MIO were conducted as part of those military operations in the Adriatic Sea. During operation *Allied Force* (AFOR), naval forces were part of the operation, but despite SACEUR's wish to establish a blockade to cut off oil shipments to Serbia, the naval forces, ultimately, did not fulfill such a MIO-role.[119] According Diego Ruiz Palmer, during the MIO conducted off the coasts of the Former-Yugoslavia, 'NATO forces, in cooperation with those of the Western European Union, challenged over 74,000 ships, boarded and inspected at sea nearly 6,000 and diverted for inspection in port nearly 1,500.'[120]

3.1.1.3. Haiti (1993-1996)[121]

While the world was closely watching the Balkan crises develop, in Haiti General Raoul Cedras, commander of the Haitian Armed Forces, staged a

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[118] Zie on this incident (in Dutch), *Grondslagen van het maritiem optreden* (2013).

[119] See A.L. Stigler,'Coalition warfare over Kosovo', in B.E. Elleman, S.C.M. Paine (eds.), *Naval coalition warfare. From the Napoleonic War to operation Iraqi Freedom* (2008), 183-192. According to Ryan who comments on the reasons why ultimately the decision was made not to use belligerent blockades, firstly the NATO nations did not want to publicly recognize Operation Allied Force as an international armed conflict (let alone a war), which lead to reluctance to use belligerent rights. Second, he mention a rather strange argument that; 'even if participating NATO States were willing to recognize the Kosovo operation as an international armed conflict, Great Britain (as previously discussed relating to the Iran -Iraq Tanker War) refuses to recognize "visit and search" as a viable belligerent right existing independent of Article 51 of the U.N. Charter.' And thirdly, he mentions that NATO nations did not want get more trouble with opposing states, such as Russia, China, and India, especially in the event that vessels of those states were to be visited. M. Ryan, 'Some practical advice for a joint force commander
contemplating the use of blockade, visit and search, maritime interception operations, maritime exclusion zones,
cordon sanitaire, and maritime warning zones during times of international armed conflict', *Paper Naval War College* (2000), 1-44, 15.

[120] D.A. Ruiz Palmer,' New operational horizons: NATO and maritime security', in *NATO Review* (winter 2007). At: www.nato.int/docu/review/2007/issue4/english/analysis4.html. The NATO fact-sheet mentions that during this operation 5.951 vessels were boarded and inspected and 1.480 vessels were diverted and inspected in port. 74.192 vessels were challenged. At: www.nato.int/ifor/general/shrp-grd.htm.

[121] Information for this paragraph was mainly drawn from D. Malone, *Decision-Making in the UN Security Council. The case of Haiti, 1990-1997* (Clarendon Press, Oxford, 1998), Chapters 4-6; D.M. Malone, S. von Eindsiedel,'Haiti', in M. Berdal and S. Economides (eds.), *United Nations Interventionism, 1991-2004* (2007), 168-191; L.E. Fielding, *Maritime interception and U.N. Sanctions* (1997), Chapters XV-XVII, and J.R. Ballard, *Upholding Democracy. The United States military campaign in Haiti 1994-1997* (1998).

coup against President Jean-Bertrand Aristide. In September 1991, Aristide had been elected in UN-monitored elections. The coup against his government would lead to a five year struggle to return to a democratically elected government. During this period, the UNSC also authorized maritime embargo operations in support of its efforts to reinstate the ousted president in the governmental saddle of Haiti.[122] Pressure was put on Cedras with the imposition of economic sanctions by the Organization of American States (OAS), which was later followed by sanctions adopted by the UNSC in SC Res. 841 (1993) that embargoed oil, weapons and petroleum. Diplomatic negotiations lead to the so called *Governors Island Agreement* (GIA) that aimed at returning Aristide to the presidency.[123] The agreement also stated that when a new prime minister was installed, the sanctions against Haiti would be lifted. On 27 August 1993, the UN lifted the sanctions through SC-Res 861(1993), and not much later approved a UN-mission (UNMIH)[124] in SC-Res. 867 (1993). Sanctions were however reinstated again[125] after an incident that threatened US soldiers that were coming into Haiti, which, incidentally occurred only a few days after the Somali incident in which US soldiers lost their lives in Mogadishu.[126] The renewed sanctions in SC-Res. 873 were bolstered when the UNSC also adopted a maritime embargo operation through SC-Res. 875 (1993) and 917 (1994). A multinational, but primarily US-led,[127] force authorized by SC-Res. 940 was mounted that would execute Operation *Uphold Democracy* to remove the de facto regime and reinstate Aristide. When Cedras finally left Haiti in September 1994, the multinational force (MNF) handed over to UNMIH. UNMIH ended its operations in 1996 after held elections were observed to be free and fair.

[122] Who was exiled to Venezuela.
[123] Malone, 87.
[124] United Nations Mission in Haiti (UNMIH).
[125] SC Res. 873 (1993).
[126] The incident involved to prevention of the physical landing of the troops on board the *USS Harlan County* whilst threatening that Haiti would become another Somalia.
[127] S.H. Kreps, 'The 1994 Haiti intervention: A unilateral operation in multilateral clothes', in *The Journal of Strategic Studies*, vol. 30, no. 3 (June 2007), 449-474.

3.1.1.4. Sierra Leone (1997-2010)[128]

In yet another corner of the world, in 1991 civil war started in Sierra Leone. In general terms, the development in Sierra Leone initially followed the same pattern as Haiti. The elected president Ahmed Tejan Kabbah was overthrown by Johnny Paul Koroma in May 1997 who established the *Armed Forces Revolutionary Council* (AFRC). The regional organization ECOWAS reacted to this coup by adopting economic sanctions against Sierra Leone, by which it tried to restore the elected president. It also prepared also for military action in the event this scheme of coercion would fail.[129] The ECOWAS sanctions and subsequent deployment (ECOMOG)[130] were followed by UN-sanctions adopted by the UNSC in SC-Res. 1132, in October 1997. These sanctions implemented an oil and arms embargo and also a travel-ban on members of the AFRC and their families. Paragraph 8 of the resolution requested ECOMOG to halt all inward maritime shipping to Sierra Leone to implement the sanctions. In 1997, the *Conakry Agreement (1997)* was reached that aimed to reinstall the president, but the agreement was not honoured by the AFRC. This then led to military intervention by the ECOMOG that was able to oust the Junta in October 1998. ECOMOG operations included enforcing the sanctions of SC-Res. 1132, although they apparently lacked capabilities to effectively enforce a maritime embargo operation.[131] In 1998 Kabbah was reinstated as president of Sierra Leone. A year later, the country fell back into conflict, during which time sanctions against Sierra Leone were not lifted. When the government finally re-established control over its territory in 2010, the UNSC adopted SC-Res. 1940 (2010) that ended the sanctions against Sierra Leone.

3.1.1.5. Lebanon (2006-present)

The maritime embargo operations off the coast of Lebanon came into being after the war of 2006, between Israel and the Hezbollah which largely took place on Lebanese territory. The military operations of Israel (opera-

[128] D. Cortright, G.A. Lopez, *The Sanctions decade. Assessing UN strategies in the 1990s* (2000), 167-181; A. Adebajo, D, Keen, 'Sierra Leone', in *United Nations interventionism, 1991-2004* (2007), 246-273. J. Hirsch, 'Sierra Leone', in D.M. Malone (ed.), *The UN Security Council. From the Cold War to the 21st Century* (Lynne Rienner Publishers, London, 2004), 521-536.
[129] Hirsch, 525.
[130] Economic Community of West African States Military Observer Group.
[131] See on this S/1997/895.

tion *Change Direction*) against the Hezbollah in Lebanon started after an incident in which after the Hezbollah kidnapped two Israeli soldiers. A naval blockade was also part of Israel's operations.[132] When on 11 August 2006, the UNSC adopted SC-Res 1701 (2006), which brought an end to this stage of the conflict, Israel refused to wind down the blockade until alternative measures were undertaken to ensure that the Hezbollah was not to receive any arms from outside Lebanon. Based on SC-Res. 1701 the UN in coordination with Lebanon expanded the longstanding and land-based UNIFIL-operation, which existed already since 1978, with a maritime dimension: Maritime Taskforce UNIFIL. It was the first time that a maritime operation came under the command and control of the UN. The MTF UNIFIL supports the Lebanese authorities in policing its maritime borders for illegal weapons coming into Lebanon.[133] The mission aims to be concluded when Lebanon has sufficient capabilities to control its maritime borders. As of 2016, the MTF UNIFIL is still ongoing. In a press release from February 2015, the UN stated that, 'Since the start of its operations on 15 October 2006, MTF has hailed around 63,000 ships and referred almost 6,000 suspicious vessels to the Lebanese authorities for further inspection.'[134]

3.1.1.6. Libya (2011-present)

The most recent maritime embargo operation that the UNSC has authorized is part of a chapter in the tumultuous developments in Northern Africa, where the people of Egypt, Tunisia and Libya rose against their leaders, a development commonly known as the Arab Spring. In the uprising against the Libyan leader Qaddafi, the UNSC decided in February 2011 to impose economic sanctions against Qaddafi by adopting SC-Res. 1971. An arms embargo, an asset freeze and a travel ban were imposed by the UNSC to force Qaddafi to stop using violence against his population. After Qaddafi used fighter jets to try to stop the uprising, the international

[132] In 2006, the UN Human Right Council installed a commission of inquiry to scrutinize the Israeli operations, including the blockade. See the report at A/HRC/3/2, 23 November 2006.
[133] M.D. Fink, 'De maritieme taakgroep UNIFIL', in *MRT*, vol. no. 4 (2008), 103-112. The Netherlands participation in MTF UNIFIL lasted from December 2006 to February 2008. Ministerie van Defensie, Eindevaluatie UNIFIL Maritiem, 25 April 2008.
[134] UNIFIL website, 'UNIFIL Maritime Task Force transfer of authority', 26 February 2015. At: http://unifil.unmissions.org/Default.aspx?tabid=11552&ctl=Details&mid=15105&ItemID=24484&language=en-US.

community's call for a no fly zone (NFZ) became louder. A few weeks later, on 17 March 2011, the UNSC adopted SC-Res. 1973 (2011), which authorized the use of force to protect the civilian population and also authorized the enforcement of the imposed sanctions at sea. SC Res. 1973 formed the basis two for military operations: operation *Odyssey Dawn* (OOD) and the NATO-led force *Unified Protector* (OUP). Part of the latter operations consisted of a maritime arms embargo operation off the coast of Libya.[135] NATO's factsheet mentions on the embargo operation's *modus operandi*:

> 8 Allies (Belgium, Canada, Greece, Italy, Netherlands, Spain, Turkey, and United Kingdom) are providing 18 ships and submarines to monitor and enforce the arms embargo mandated by the UN. They are supported by surveillance planes and fighter jets as required. The Task Force's ships enforcing the arms embargo will remain in international waters and will not enter Libyan territorial waters. While NATO cannot block all routes into the country, it has cut off the quickest, easiest and straightest route to Libya.
>
> NATO ships will use surveillance to verify the activity of shipping in the region, separating out legitimate commercial and private traffic from suspicious vessels that warrant closer inspection. Suspicious traffic will be hailed by radio, and if they cannot give satisfactory information about their cargoes, the NATO ships are authorized to intercept them. As a last resort, the Task Force is empowered to use force.
>
> If weapons or mercenaries are found, the vessel and its crew will be escorted to a secure port where international and national authorities will take charge. Suspected aircraft can be intercepted and escorted to an airport designated by NATO.[136]

By the end of the operation, NATO published that 2862 vessels had been diverted and 293 vessels had been boarded. Eleven ships were denied en-

[135] M.D. Fink, UN-mandated maritime arms embargo operations in operation Unified Protector', in *Revue de Droit Militaire et Droit de la Guerre*, vol. 1-2 (2011), 237-260.
[136] NATO Factsheet (no date), Operation UNIFIED PROTECTOR NATO Arms Embargo against Libya. At: www.nato.int/nato_static/assets/pdf/pdf_2011_03/unified-protector-arms-embargo-factsheet.pdf.

try into Libyan ports, as they posed a risk to the civilian population.[137] The NATO operation ended eight months later, shortly after the death of Qaddafi on 20 October 2011,[138] when the Council stopped the authorization to use force with regard to the situation in Libya in SC-Res. 2016 (2011).

The ending of NATO's operations in 2011, however, did not prove to be the start of a calm state-rebuilding process. In March 2014, about three years after the conflict, and with Libya transiting through an internal struggle where local militias fight against the Libyan government and held oil ports while attempting to sell this oil at sea, the UNSC adopted another resolution, SC-Res. 2146 (2014) that authorized inspecting vessels on the high seas, when designated by the Sanctions Committee. The UN-resolution was adopted a few days after US Navy Seals operating from *USS Roosevelt* had stopped and boarded the *Morning Glory* in international waters in the vicinity of Cyprus, a vessel that was said to be stateless and which tried sell crude oil with a tanker that was stolen earlier.[139] The vessel was escorted back to the Libyan port of Es Sidra.

3.1.2. Strand 2: The 11 September attacks

The 11 September attacks on the United States in 2001 expanded the scope of using maritime interception into new waters. MIO became an important means in the fight against terrorism at sea. Although in the ten years before MIO grew to be firmly connected to the UN-collective security system, during the naval operations that followed the 9/11 attacks a definite step was taken away from the view that it was only related to UN-enforcement operations. It was now applied in a wider scope. Not only did it widen from UN-sanctions to terrorism, but it also widened from goods to persons.

The military reaction to the 11 September terrorist attacks resulted into two naval operations that started almost immediately after 11 September: Operation *Enduring Freedom* (OEF) and Operation *Active Endeavour*

[137] NATO Factsheet (October 2011), Operation UNIFIED PROTECTOR NATO-led Arms Embargo against Libya. At: http://www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111005_111005-factsheet_arms_embargo.pdf.
[138] The *International Herald Tribune* (IHT) heads it newspaper of Friday 21st October 2011 with: "Qaddafi's brutal end". Earlier that year the IHT headed its newspaper on the occasion of Osama Bin Laden's death with: "Bin Laden's bloody end".
[139] *US Department of Defense*, press release, no. NR-126-14; March 17, 2014, DoD Statement on Boarding of Commercial Tanker Morning Glory. At http://www.defense.gov/Releases/Release.aspx?ReleaseID=16582.

(OAE). Both were predominantly interception operations. In the first phase of OEF, however, naval forces were supporting combat operations in Afghanistan from the sea. The purpose of both maritime interception operations was not to enforce economic measures imposed by the UNSC, but rather to locate suspected terrorists along with their support network and deny those terrorist to use the sea as a means. The subsequent focus on also weapons of mass destruction that followed after 11 September, led to a third military operation that included a maritime dimension. The perceived threat of WMD in the hands of terrorists moved the attention back to Iraq, which led to the military invasion of the Iraq, on 20 March 2003. This operation was called Operation Iraqi Freedom (OIF).

3.1.2.1. Operation Enduring Freedom

Even though Afghanistan does not have a coastline or a navy, the military campaign against the Taliban and Al Qaida in Afghanistan also had a maritime dimension. On 7 October 2001, naval forces of different States in a coalition operation[140] started to conduct interception operations in the seas around the Arabian Peninsula to deter, deny and disrupt the movement of terrorists, and also supported the war in Afghanistan from the sea, with strike and close air support operations as priority.[141] As for the first aspect of the operation, the US coined the term *Leadership Interdiction Operations* (LIO) for the search for terrorists at sea. Tactically, LIO are similar to MIO but to a different end: persons instead of goods are the object of interception. The area in which the searches were undertaken was the sea-area between Pakistan and the Horn of Africa. Whereas the mission *Enduring Freedom* was firstly connected to military operations in relation to Afghanistan, it has over the years developed to be an overarching title for several different military efforts against terrorism, all of which may have different legal backgrounds.

[140] Schneller mentions that the order of battle on 7 October was 48 coalition warships in total: 23 US, 20 British, 2 French and 1 Australian. R.J. Schneller,'Operation enduring Freedom. Coalition warfare from the sea and on the sea', in B.A. Elleman, S.C.M. Paine (eds.) *Naval Coalition Warfare. From the Napoleonic war to operation Iraqi Freedom* (Routledge, 2008), 193-207.
[141] Schneller (2008), 196.

3.1.2.2. Operation Active Endeavour

NATO's involvement in Afghanistan since 2003 has not included a maritime dimension.[142] There has never been a naval component within the ISAF-operation.[143] That is, however, not to say that NATO did not do anything at sea as a reaction to the 9/11 attacks. On the contrary, it started operation *Active Endeavour* (OAE). The operation was mounted by NATO on 26 October 2001 and aimed '*to help deter, defend, disrupt and protect against terrorism*'.[144] The operation was unique in the sense that NATO for the first time ever invoked its cornerstone-article, Article 5 of the NATO-Treaty.[145] Launching OAE was one of the eight measures NATO took to support the US in its activities against terrorism.[146] The standing NATO maritime group (SNMG, then named STANAVFORMED[147]) was assigned to patrol the Eastern Mediterranean Sea. In 2003, NATO expanded OAE to the Strait of Gibraltar in order to protect merchant shipping passing through the strait against possible attacks. The escort operations through the strait of Gibraltar (STROGOPS) were suspended in 2004, and have been dormant ever since. Although STROGOPS were suspended, in 2004, operations expanded to encompass the whole Mediterranean Sea.[148] Apart from the change in 2004 to include also non-NATO nations in OAE (which created another purpose to the operation, namely as a vehicle for regional military cooperation) a second significant change in 2009 moved the operation from a platform based to a so called network based operation.[149] With that, the focus of operations moved away from actual grey hulls patrolling the seas, to the direction of building networks between States and relevant organizations and interlinking data that is to enhance maritime situational awareness (MSA) at sea. As of 2016, OAE is still ongoing. NATO's Maritime Command in Northwood (UK) that leads OAE on an operational level, states that more than 100.000 vessels have been hailed and 155 vessels boarded during the

[142] NATO deployed the International Security and Assistance Force (ISAF).
[143] Warships from several states did, however, apparently support ISAF with aircraft carriers in the Arabian Sea from several NATO-states, from where NATO-aircraft would take off to provide air support in Afghanistan. See D.A. Palmer (2016), 371-372. But ISAF never had an actual naval component command to command a naval force under the ISAF-mission.
[144] http://www.nato.int/cps/ar/natolive/topics_7932.htm.
[145] NATO *press release* 124, 12 September 2011. www.nato.int/docu/pr/2001/p01-124e.htm.
[146] See on these measures, P.H. Gordon, NATO after 11 September, in *Survival*, vol. 43, no. 4 (2001-2002), 1-18.
[147] Standing Naval Force Mediterranean.
[148] *NATO Briefing paper, Active Endeavour,* July 2006.
[149] http://www.nato.int/cps/en/natolive/topics_7932.htm.

course of its operations.[150] Up until today, however, no major interception incident has been highlighted in the public realm since the operations' existence that can be contributed to the efforts of OAE.

3.1.2.3. Operation Iraqi Freedom

On board the *USS Abraham Lincoln* on May 1, 2003 the US President George Bush announced that major combat operations against the Iraqi armed forces were over.[151] Although the refocus to Iraq and the legal basis for the Iraqi invasion in 2003 were hotly debated, it is clear that the operation was undertaken within the context of the law of armed conflict. Whereas the US prepared for prize taking during OIF, the UK naval operations appears not to have been involved in any interception of vessels.[152] After major combat ended, the US and UK became the occupying powers in Iraq (the so called *coalition provisional authority*, CPA), supported by other States. On 28 June 2004, the head of the CPA Paul Bremer III handed back the sovereignty to Iraq with SC- Res.1546 (2004). The US/UK and coalition military presence in Iraq, however, lasted until 2012. Unable to obtain sufficient legal guarantees against possible criminal prosecution of foreign service members in Iraq, the US, UK and NATO forces left Iraq before the first of January 2012.[153]

3.1.2.4. Multiple MIO's

It is interesting to note that at one stage in 2003 multiple maritime interceptions operations with different legal backgrounds were conducted at the same time in the Persian Gulf and Arabian Sea region, which were carried out by warships of different States. During operation *Iraqi Freedom* the UN-sanctions imposed against Iraq were still operative and en-

[150] http://www.mc.nato.int/ops/Pages/OAE.aspx.
[151] P. L. Bergen, *The Longest War. The Enduring Conflict between America and Al-Qaeda* (2011), 172.
[152] N. Brown, 'Legal Considerations in Relation to Maritime Operations against Iraq', in *ILS* vol. 86 (2010). At p. 133 he states: 'During the international armed conflict in 2003, while it was determined by coalition partners that their naval forces could as a matter of law have exercised belligerent rights of visit and search against enemy and (in certain circumstances) neutral vessels, this never occurred'.
[153] See M.D. Fink,'De ontwikkeling van de strafrechtelijke rechtsmacht over het personeel van de NAVO-trainingsmissie in Irak (NTM-I)', in *MRT*, vol. 105, no. 6 (2012), 261-264.

forced by MIF-forces, until the UNSC adopted SC-Res. 1483 (2003).[154] At the same time OEF-interceptions were taking place in other maritime areas around the Arabian Peninsula in the context of operations with regard to Afghanistan. Therefore, different legal bases for MIO existed in roughly the same area. All operations were coordinated from the (since 2002)[155] US/UK-led naval headquarters in Bahrain,[156] which was tasked to coordinate all the naval operations around the Arabian Peninsula. The forces commanded by that headquarters were split in several different taskforces to keep a clear enough separation of the different mandates that were coordinated by the headquarters.[157] Yet, one can imagine the challenges of multiple MIO in the same area and coordinated by one headquarter. In his article, Crist relates to the following incident:

> A boarding action was undertaken by a Canadian warship that boarded a vessel within the OEF-context, after which the vessel was released. The commander of the warship was asked, however, to board again to search for Iraqi agents. The Canadians declined a second boarding of the same vessel because Canada did not take part in OIF.[158]

The existence of multiple and simultaneously ongoing maritime interception operations prompted States to politically decide to follow different

[154] Although SC-Res. 1483 ended the economic embargo as a result of the Iraq-Kuwait invasion, arguably, it did not lift the embargo for arms related material. With that, in the post conflict role it appears that still a ground for MIO against Iraq was left. Paragraph 10 of SC-Res. 1483 (2003) reads:

> Decides that, with the exception of prohibitions related to the sale or supply to Iraq of arms and related materiel other than those arms and related materiel required by the Authority to serve the purposes of this and other related resolutions, all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq established by resolution 661 (1990) and subsequent relevant resolutions, including resolution 778 (1992) of 2 October 1992, shall no longer apply;

[155] Before 2002, the headquarters was primarily a US naval headquarters.

[156] The Combined Forces Maritime Component Command (CFMCC).

[157] Throughout the years, the headquarters had to make several changes to its organizational structure to accommodate all the different mandates and politics that comes with it that occurred in the area around the Arabian Peninsula. Currently, the naval headquarters in Bahrain has a separate US (NAVCENT) and UK (UKMCC) and a coalition headquarters, the Combined Maritime Forces (CMF), existing of TF 150, 151 and 152. A detailed description (in Dutch) of the history of the headquarters is given by Commander (RNLN) D.J. Kuijper and Captain (RNLN) S.J.J. Both, 'Combined Maritime Forces. Het belang van deelname in een unieke maritieme coalitie', in *Militaire Spectator* (2010), 600-617.

[158] D.B. Crist, 'The formation of a coalition of the willing and Operation Iraqi Freedom', in B.A. Ellerman, S.C.M. Paine (eds.), *Naval coalition warfare. From the Napoleonic War to Operation Iraqi Freedom* (Routledge 2008), 208-217, at 210.

paths in the manner in which way they gave authority to their warships participating in these operations. An Australian military legal advisor, participating in both the MIF and *Iraqi Freedom* relates that, although the Iraq War of 2003 opened up another legal regime to be applied, namely LOAC and the law of naval warfare in particular, the Australian warships continued utilizing the UN-MIO regime, rather than switching to belligerent rights.[159] She states:

> 'The coalition forces could have used the traditional laws of naval warfare as just outlined, or the long-standing and long-practised Security Council resolution regime. It was the latter legal framework that was utilised. Given that for the previous 13 years, the MIO forces had been using the sanctions resolutions regime — and importantly, that the neutral or friendly shipping in the Gulf was also familiar with the mechanisms of that regime — it was appropriate that those resolutions, rather than naval warfare, continued to be utilized.'[160]

In that same respect, commodore (UK Navy, head of navy legal services) Neil Brown mentions:

> '…the United Kingdom decided to rely solely upon the UN Security Council resolutions that permitted the use of all necessary means to stop and search all inward and outward shipping, and to seize any goods breaking the comprehensive sanctions against Iraq. US naval forces, on the other hand, sought in addition to establish the necessary mechanisms to be able to exercise the belligerent rights of visit and search.'[161]

Be that as it may, by this time the term MIO had evolved and was generalized beyond UN-embargo operations alone. It had come to be understood as an operational term of art in which boarding operations of foreign flagged vessels was meant, irrespective of its legal grounds or purpose.

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[159] See also commodore (Australian Navy) David Letts, who appears to imply that although a number of legal bases could have been used during the Iraq War, Australia settled with UNCLOS-authorities only. See. D. Letts, 'Recent Australian Experience of the Law of the Sea and Military Operations', in *Australian Yearbook on International Law*, vol. 24 (2005).

[160] P. Campbell, 'Twenty five. Task Group Command Legal Officer SLIPPER Four, BASTILLE & FALCONER ', in J. Mortimer, D. Stevens (eds.), *Presence, Power Projection and Sea Control The RAN in the Gulf 1990-2009* (2009), 257-265, 264. The Netherlands stopped participating in the MIF in 2000, before the 9/11 attacks. It then started to participate in OEF.

[161] Brown (2010), 133.

3.1.3. Strand 3: From Al Qaida and Taliban to enhancing maritime security

The third strand of evolution in MIO is the expansion of the applicability of MIO not only to Al Qaida, the Taliban and its supporters, but to various maritime threats of terrorism in general. Many initiatives have started since the so-called *Global War on Terror* (GWOT) focused the attention of military forces upon terrorism in general. In the maritime domain, the GWOT focused largely on possible terrorist acts against maritime security and threats of WMD by terrorists in particular. Directly connected to maritime interception operations three initiatives must be mentioned here: first, the expansion of maritime interception operations beyond Al Qaida and the Taliban and its supporters, ultimately resulting into so called maritime security operations (MSO). Second is the proliferation security initiative (PSI) and third is the updating of the SUA-Convention in 2005.

3.1.3.1. Expanded MIO and Maritime Security Operations (MSO)

Maritime embargo operations in support of economic sanctions have been called by some traditional, or limited MIO.[162] The reaction to 9/11 expanded the use of MIO to hostilities, and subsequently introduced it as an instrument against wider terrorist threats beyond those of Al Qaida and its supporters and beyond Afghanistan. Although these operations against terrorism are generally understood by the US Government to be based on the right of self-defence, it is not the same self-defence as was used to start operation *Enduring Freedom*. The MIO conducted in this latter context were called 'expanded MIO, abbreviated to EMIO.[163] O'Rourke states that, 'EMIO are authorized by the President and directed by the Secretary of Defence to intercept vessels identified to be transporting terrorists and/or terrorist-related materiel that poses an imminent threat to the United States and its allies.[164] Allen adds that EMIO are, 'designed to intercept

[162] S.L. Hodgkinson, 'Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap', *American University International Law Review*, vol. 22 issue 4 (2007), 853- 671, at 589.
[163] Hodgkinson, 626.
[164] D. O' Rourke, *Navy Role in Irregular Warfare and Counterterrorism: Background and Issues for Congress, Congressional research service report for congress* (4 June 2009), 3. See also the definition of EMIO in Joint Publication 3-03:

> Expanded maritime interception operations (EMIO) are authorized by the President and directed by the Secretary of Defense to deter, degrade, and/or disrupt or gather intelligence to prevent attacks against the US and its allies. EMIO involves interception of vessels identified to be transporting terrorists and/or terrorist-related materiel that pose an imminent

targeted personnel or material that pose an imminent threat to the U.S. EMIO may involve multinational forces and may be implemented even when sanctions have not been imposed.'[165] Together with the strategic development of a focus on maritime security, this expansion of using MIO to wider terrorist threats moved to the international community to taking the path towards Maritime Security Operations (MSO): maritime policing of the seas with a view to enhance maritime security, which in the view of the US would mainly be threatened by terrorism.

3.1.3.2. Proliferation Security Initiative (PSI)

As the US expanded its military efforts, not only against the perpetrators of 9/11, but against terrorism in a wider sense, and in a broader geographical context, it also prompted new initiatives in the world of interception at sea by warships. At this point along with terrorists, weapons of mass destruction (WMD) became a focal point in the maritime dimension. NATO's Deputy Assistant Secretary-General for weapons of mass destruction policy notes in 2009: 'Looking at the past, together with the severe implications of using CBRN materials and coupled with the motivation of certain terrorists groups such as Al Qaida, we must acknowledge that WMD are a real and likely threat'.[166] In May 2003, US President George Bush, having closed the major combat operations phase in Iraq and in search of WMD, launched the *Proliferation Security Initiative* (PSI) with the aim to counter and minimize the threats of weapons of mass destruction (WMD) at sea. The PSI connects the arms control efforts of proliferation of WMD with the terrorist threat. The *So San* incident[167]

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threat to the United States and its allies. EMIO may be implemented without sanctions and may involve multinational forces or OGAs. The legal rationales required to permit boarding include those listed in subparagraph (4), above.

[165] G.H. Allen, 'limits to the use of force in maritime operations in support of WMD counter-proliferation initiatives', in T. Sparks, G.M. Sulmasy (eds.) *ILS* vol. 81 (Naval War College), 77-139.

[166] G.B. Roberts,'Hostis Humani Generis: The threat of WMD terrorism and how NATO is facing the ultimate threat', in *Defence against terrorism Review*, vol. 2, no. 1 (2009), 1-13, at 1.

[167] The vessel *So San* was suspected of carrying scud-missiles from North Korea to Yemen. After the boarding by Spanish forces from the Spanish warship *Navarra* upon request of the US this suspicion proved to be true. The name *So San* was freshly painted on the stern while no name was registered under that name in North Korea. According to Roach after being queried, the master of the vessel replied that it was registered in Cambodia. The Cambodian authorities appeared to have confirmed that a vessel meeting the description was registered in Cambodia, but under the name of *Pan Hope* instead of *So San*. No legal ground was, however, found to seize the scuds. Nothing prohibited North Korea to ship scuds to Yemen. The *So San* was released to proceed to Yemen with its original cargo still aboard.

that occurred in December 2001 in the Arabian Sea has always been mentioned in this context as *the* example that underlined that the WMD threat was real and the legal possibilities were limited.[168] According to Davis, the PSI emerged from two major concerns. First, the history of the terrorist attacks against the *USS Cole*[169] in 2000 and the French Tanker *MV Limburg*[170] in October 2002 had heightened the fear of more terrorist attacks in the maritime domain. Second, terrorist groups would try to find weak spots in the international maritime traffic and transport systems to transport chemical, biological or nuclear weapons.[171] The essence of PSI, as Klein mentions: 'is its nature as a political and cooperative regime, which facilitates coordination between the States concerned and allows for the better flow of information and interaction at an operational level between the participants.'[172] The PSI is neither an organization nor a treaty, but an initiative based on the willingness of States to cooperate in the non-proliferation of WMD. The PSI is based upon a set of four interdiction principles to which States as PSI-participants can sign up to. These principles rely on already existing legal frameworks for the proliferation of WMD and focused on interdiction of chemical, biological and nuclear weapons, their delivery systems and related material. Furthermore, to strengthen the legal grounds for actual interception within the context of PSI, the US sought bilateral shipboarding agreements with other States which were to strengthen the PSI through the ability to board foreign flagged vessels on the high seas.[173] There is hardly any public information on actual "PSI-interceptions". The interception of the *BBC China* in 2003[174] and *M/V Light* in 2011[175] appear to be the two publicly known

[168] D. Guilfoyle, 'The proliferation security initiative: interdiction vessels in international waters to prevent the spread of weapons of mass destruction', in *Melbourne University Law Review*, vol. 29 (2005), 733-764, 735-736;
[169] In October 2000 the *USS Cole* suffered a small boat attack in the port of Aden in Yemen. 17 American sailors died in the attack. The attack was claimed by Al Qaida.
[170] The supertanker *Limburg* was attacked by a small boat full of explosives off the coast of Yemen which blew a hole in the hull of the oil-tanker.
[171] I. Davis,'The Proliferation Security Initiative. Effective multilateralism or "smoke and mirrors"? in O. Meier and C. Daase (eds.), *'Arms Control in the 21st Century* (2013), 146-166, at 147.
[172] Klein, 'Maritime Security', 193.
[173] Kraska and Pedrozo have published in 2013 a list of eleven US-bilateral PSI shipboarding agreements. Kraska & Pedrozo, 794.
[174] The German flagged vessel *BBC China* was a vessel that carried centrifuge parts for the Libyan nuclear program. The vessel was ordered by Germany to divert to the Italian port Taranto in Southern Italy, where U.S. agents boarded the vessel for a search. C.H. Allen, *Maritime Counterproliferation Operations and the Rule of Law (*2007), 67; R. Wright, 'Ship Incident May Have Swayed Libya ', in *Washington Post*, 1 January 2004. It appears, however, to be debated whether or not the *BBC China*

actual activities. Apart from the US-led efforts, also the UNSC adopted SC-Res. 1540 (2004) which also aims at WMD-proliferation.

3.1.3.3. Updating International Agreements: The SUA-Protocol 2005

Next to PSI and the UNSC putting the issue in the limelight by adopting SC-Res. 1540, other paths to enable actions against threats to maritime security were sought. One of these has been the path of international agreements. Treaties on maritime terrorism existed since the hijacking of the *Achillo Lauro,* in October 1985.[176] The *Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (SUA-Convention)[177] was created to make punishable such events that occurred on the *Achillo Lauro,* which could not be brought under the legal umbrella of acts of piracy, and entered into force on 1 March 1992. Some authors take the position that one of the major flaws of the SUA-Convention is that it does not create any authorities for non-flag States to board a foreign flagged vessel to stop and arrest persons.[178] The focus on terrorism after 9/11 and a need to find better instruments to take effective action spurred to address this lacuna. As a result, the SUA-Protocol (2005) was created.[179] This protocol aims at updating the SUA-Convention in two ways. First, it makes it possible to avoid time consuming procedures to be able to board a foreign flagged vessel so as to enhance maritime security and at the same time to adhere to the fundamental principle of exclusive flag

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operation can actually be claimed as a PSI-operation and success. See: http://www.armscontrol.org/act/2005_07-08/Interdiction_Misrepresented.

[175] The Belize flagged vessel *M/V Light* from North-Korea on its way to Myanmar and suspected of carrying missile parts was forced to turn back by the US who dispatched the *USS McCampbell* to intercept the *M/V Light*. Although authority to board was given by Belize, based on the US-Belize shipboarding agreement the master refused. Instead it finally turned back to North Korea. D.E. Sanger, 'U.S. Said to Turn Back North Korea Missile Shipment', in *New York Times*, 12 June 2011. At: http://www.nytimes.com/2011/06/13/world/asia/13missile.html?_r=0; E. Graham, 'Maritime Counter-proliferation: the case of MV LIGHT', in *RSIS Commentaries*, no. 96/2011 (29 June 2011).

[176] A. Cassese, *Terrorism, politics and Law. The Achillo lauro affair*. (Polity press, 1989); T. Treves, 'The Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation', in N. Ronzitti (ed.) *Maritime terrorism and international law* (1990), 69-90,p. 69.

[177] *Convention on the suppression of unlawful acts against the safety of maritime navigation Rome, 1988.*

[178] S.D. MacDonald, 'The SUA 2005 Protocol: A critical reflection', in, *The international Journal of marine and coastal law*, vol. 28 (2013), 485-516, at 492.

[179] There are in fact two protocols to the SUA-Convention. The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. Whenever the 2005 Protocol is mentioned, the first protocol is meant.

State jurisdiction.[180] Second, a new set of offences was introduced that focus on the use of WMD in a terrorist manner. The SUA-Protocol (2005) has entered into force in 2010.[181]

3.1.4. Strand 4: Piracy[182]

Carvalho divides the role of naval forces in peacekeeping after the Cold War in two main legs. The first is naval peacekeeping that supports land-based operations, and the second are naval forces that act autonomously from land operations. With the current focus on maritime security, he has noted a shift from land-based support operations to autonomous sea operations. Counter-piracy operations, he concludes, are; 'in a certain way, the empirical achievement of an autonomous concept of peacekeeping operations at sea envisaged by scholars engaged in the naval peacekeeping debate.'[183] Countering piracy off the coast of Somalia has since 2008 become a major activity for navies. It also pushed NATO and the EU to go beyond their usual 'maritime backyard' of the Mediterranean Sea, into the seas around the Arabian Peninsula. Although piracy has been for years on the agenda of the Asian States adjacent to the Strait of Malacca[184], when the UNSC ultimately got involved in the issue of piracy off the coast of Somalia, the world's focus turned to piracy, and more importantly, it also pulled the criminal act within the realm of a threat to international peace and security. Interestingly, however, as SC-Res. 2115 (2013) noted, piracy *by itself* is not considered as a threat to peace and security, but has linked the issue of piracy to the situation in Somalia, which continue to be a threat to peace and security. The crime of piracy is, therefore, by itself formally not strictly an issue of international peace and security, but it is very closely related to be included as a factor within the situation in Somalia, which *does* constitute a threat to in international peace and security

[180] MacDonald (2013), 509.
[181] 10 July 2010.
[182] Parts of this this paragraph is drawn from an article I wrote together with Colonel (US Army, Judge Advocate General) Richard Galvin, which was published in the *Netherlands International Law Journal* in 2009.
[183] Carvalho, 54.
[184] Bateman and Chan opine that piracy and armed robbery in the Asian regions is currently generally not a serious problem. The level is not of the sort that it needs operational involvement of non-regional actors. S. Batemen, J. Chan, 'Piracy and armed robbery against ships in the South China Sea – Possible causes and solutions', S. Wu and K. Zou (ed.), *Non-Traditional Security Issues and the South China Sea* (2014), 133-144, at 134-135.

in the region. When operations around the Arabian Peninsula started in the context of OEF, States were more and more also confronted with the Somali-piracy activities. With regard to the conflict in Somalia discussion arose whether terrorists and pirates were or could be linked to one another. Seeking to enhance possibilities to find ways to act against terrorists at sea the law of piracy was viewed upon as a possible framework. Piracy, hitchhiking on the back of the efforts to find more avenues to fight terrorism at sea, rose on the international agenda.[185] Also, already earlier, since 2006, the World Food Program (WFP) sought ways to protect their humanitarian shipping from being attacked and hijacked and reached out to navies pursuing their anti-terrorist task in that region. Whereas the attention to piracy may have surfaced through the debate on how to act against terrorists at sea, current counter-piracy operations are not conceived as anti-terrorism operations. As the former Legal Advisor to the NATO-Secretary General Peter Olson commented on the nature of NATO's counter-piracy operation *Ocean Shield*: 'Although designed for and conducted by military forces, Ocean Shield is neither conceived nor implemented as a counter-terrorism or combat operation.'[186]

3.1.4.1. Counter-piracy operations[187]

In August 2007, the UNSC adopted SC-Res. 1772 to extent the ongoing AMISOM-mission of the African Union in Somalia. This resolution also encouraged member States with naval units in the area to be vigilant against any act against piracy of the coast of Somalia and protect merchant shipping, in particular shipping with humanitarian aid. Somalia, already for years considered to be a failed state and now suffered attacks against the humanitarian relief shipping of aid moving into Somalia. France, Denmark, Canada and the Netherlands were the first individual States to send warships to protect merchant shipping that were carrying

[185] See on the legal differences between piracy and terrorism,'D. Guilfoyle, 'Piracy and terrorism', in P. Koutrakos, A. Skordas, *The law and practice of piracy at sea: European and international perspectives* (2014), 33-52.
[186] P.M. Olson, 'Countering piracy off the coast of Somalia: A NATO perspective', in P. Koutrakos, A. Skordas, *The law and practice of piracy at sea: European and international perspectives* (2014), 183-194, 183.
[187] Some view that the term 'counter-piracy' should be distinct from 'anti-piracy'. Whereas counter-piracy relates to the states' activities to protect vessels from being pirated, is the latter term is reserved for practical activities of the vessel owner or master that minimize the risk that the vessel can be boarded.

humanitarian aid of the WFP. In 2008, the UNSC adopted SC-Res. 1816 (2008). This resolution marked the active involvement of the UNSC and its member States in the fight against piracy off the coast of Somalia.

Based on the Council's call to fight piracy, three different multilateral operations were set up to protect international trade and fight piracy. NATO started its counter-piracy operations in 2008 with operation *Allied Provider* (OAP). Its primary aim was to protect WFP-relief shipping. *Allied Provider* took place from mid-October to December 2008. This NATO operation was to help bridge the gap between the EU-decision on 8 December 2008 to send a naval force to the Somali region and the actual start of the EU-operation, which was to be named operation *Atalanta*.[188] NATO opined that next to the EU-operation it still could have a significant role in counter-piracy operations and therefore commenced with Operation *Allied Protector* (OAP II) in March 2009. The NATO mission was another short mission that was to be complementary to the EU-mission. In August 2009, NATO launched its longer term mission Operation *Ocean Shield* (OOS), which currently, at the time of writing, is still ongoing. Next to the EU and NATO initiatives, a US-led coalition was launched in January 2009 to counter piracy and brought under the command of Combined Maritime Forces (CMF).[189] One of the three taskforces (TF 151) of CMF is specifically set up to conduct counter-piracy operations. Apart from these multilateral initiatives, individual States also decided to send warships on a unilateral basis to the seas around the Horn of Africa and the Arabian Sea. States, such as India, Russia and China, deployed warships that started contributing to enhancing the safety of shipping in the region. As is often mentioned, these different naval operations, all with their own specific mandate, corporate and coordinate amongst each other in order to give the maximum effect to their presence in the region.[190]

In SC-Res. 2067 (2012), the UNSC has noted the decline of number of vessels kidnapped by pirates. A CMF press release from June 2015 mentioned that since 2012, there were no successful pirate attacks in the operational area in which the combined naval efforts are operating, but

[188] EU-Council decision 2008/918/CFSP, 8 December 2008.
[189] CMF is an international partnership organization with around 30 states that contribute vessels and staff to its Headquarters in Bahrain and has three taskforces under its command: CTF 150, 151 and 152. CTF 150 focuses on maritime security and anti-terrorist operations at sea in the Arabian Sea, CTF 151 focuses on piracy and CTF 152 focuses on security and cooperation in the Persian Gulf.
[190] The *SHADE*-meeting (Shared Awareness & Deconfliction) is often mentioned in this context.

without an effective deterrent presence the threat could re-emerge again.[191] As of 2016, naval efforts against piracy and protecting international trade have not declined in the area of the Indian Ocean.

The legal challenges with regard to piracy, as well as the legal literature on these challenges, are vast.[192] One of the major reasons is that the fight against piracy also in particular focuses on the aftermath of what happens at sea. Counter-piracy operations above all have underlined the challenges that go with ultimately prosecuting pirates in a court of law. Challenges for instance lie with gaps in the existing international and national legal frameworks relating to piracy. These include the interacting of national and international law and challenges and in the practical application of law enforcement at sea. Counter-piracy operations have also shown that successfully conducting MIO goes beyond just the operational dimension at sea and the military, but requires intensive coordination with for instance public prosecutors and foreign ministries. As such, it underlines that MIO must be considered not as a stand-alone activity at sea, but as a comprehensive activity that has more phases and more involved agencies that need to work together for mission success.

The significance of counter-piracy operations to the applicable law framework in maritime interception operations is that since counter-piracy operations have started they have underlined the shift to law enforcement operations at sea. Douglas Guilfoyle aptly noted that pirates for a number

[191] See http://combinedmaritimeforces.com/2015/06/22/international-maritime-community-works-together-to-counter-piracy-at-shade/

[192] In the beginning of the 20th century the focal point of piracy was still on piracy in East Asia (e.g. R.C. Beckman, Combatting piracy and armed robbery against ships in Southeast Asia: The way forward', in *ODIL*, vol. 33 (2002), 317-341; S.M. Menefee, Foreign naval intervention in cases of piracy: Problems and strategies', in *The international journal of marine and coastal law*, vol. 14, no. 3 (1999), 353-370). When the issue of maritime terrorism came more to the foreground, more focus was put on the relationship between piracy and terrorism (e.g. T. Garmon, International law of the seas: reconciling the law of piracy and terrorism in the wake of September 12', in *Tulane maritime law journal*, vol. 27 (2002), 257-275; H.E. Jose Luis Jesus, Protection of foreign ships against piracy and terrorism at sea: legal aspects, in *The international journal of marine and coastal law*, vol. 18 no. 3 (2003), 363-400; M. Mejia jr.,'Maritime gerrymandering: dilemmas in defining piracy, terrorism and other acts of maritime violence', in *Journal of international commercial law*, vol. 2 no. 2 (2003), 153-175. When the major naval operations began after the involvement of the UN the focus shifted to the challenges that arose with fighting pirates off the coast of Somalia. (e.g. E Kontorovich, "A Guantanamo on the sea". The difficulties of prosecuting pirates and terrorists', in *Northwestern University of Law, Public Law and Legal Theory, series 09-10*; D. Guilfoyle, The laws of war and the fight against Somali piracy: combatants or criminals', in *Melbourne Journal of international law*, vol. 11 (2010), 1-13; T. Treves, 'Piracy, laws of the sea, and use of force: Developments off the coast of Somalia', *EJIL*, vol. 20. No 2 (2009), 399-408.

of reasons can be seen as 'agents of change'.[193] One of those changes was the shift to the law enforcement paradigm in counter-piracy operations within the context of a military response authorized by a UN-Security Council resolution. It also underlined a start of more serious thoughts as to the application of human rights law in naval operations. Several cases of piracy have now appeared before national courts in a number of States, such as Germany,[194] the United States,[195] The Netherlands,[196] Kenya and the Seychelles.[197] On a more practical level, counter-piracy operations extended the need for military also to be in the courtrooms after the arrest. Crews of Netherlands warships involved in counter-piracy operations went to make statements in courts in the Seychelles and Germany to contribute to the successful prosecution of pirates. In December 2014, the jurisprudence on piracy has been enriched by judgments of the European Court of Human Rights. The ECtHR judged in two piracy cases that emerged from French actions on and off the coast of Somalia.[198]

[193] D. Guilfoyle, 'Somali pirates as agents of change in international law making and organization', in *Cambridge Journal of International and Comparative Law*, no. 1(3) 2012, 81-106.

[194] On 19 October 2012, the district court in Hamburg sentenced ten Somali pirates that had hijacked the German flagged vessel *Taipan*. The pirates were detained after a Netherlands boarding team from *Hr. Ms. Tromp* boarded the vessel in 2010 and detained the pirates.

[195] Domestic courts in the United States have had several cases against Somali pirates, among which the case of the Hijacking of the *Maersk Alabama* in 2009.

[196] District Court of Rotterdam: *Samanyulo* (Netherlands Antilles flagged), *Choizil* (South African flagged) and *Al Fedda*. The first case involved the capture of pirates by the Danish warship *Absalon*, where the suspect-pirates were transferred to the Netherlands. The third case involved an incident where the pirates opened fire on the marines that where in the conduct of approaching the dhow. The Public prosecutor attempted to press charges on account of murder or manslaughter against the approach marines, but they were acquitted of that charge.

[197] The UN-SG report on piracy (S/2013/623) mentions the following on Kenya and the Seychelles:

> 45. Countries in the region supported by the Counter-Piracy Programme continue to receive individuals suspected of piracy for prosecution. In total, 53 suspects remain on remand in Kenya, Mauritius and Seychelles, with the Programme supporting their trials. Another 153 convicted pirates are currently serving their sentences in Kenya and Seychelles. Prison conditions for these inmates continue to be monitored and improved where required.

[198] *Ali Samatar and other vs. France* (appl. no's 17110/10 and 17301/10) and *Hassan and others vs. France* (appl. no's 46695/10 and 54588/10), 4 December 2014. The first case (Samatar) related to the hijack of the French flagged vessel *Ponant* in 2007. The hijackers were arrested on land by French authorities. The second case (Hassan) is related to the French flagged yacht *Carre d'As* in September 2008. It was hijacked and subsequently freed by French commandos on board the French frigate *Courbet*.

	Operation Alias	Organization	Duration of operation
1	Operation Allied Provider (OAP)	NATO	24 October – 12 December 2008
2	Operation Allied Protector (OAPII)	NATO	24 March – 17 August 2009
3	Operation Ocean Shield (OOS)	NATO	17 August 2009 - present
4	Operation Atalanta	EU	8 December 2008 – present
5	Combined maritime forces (CMF) – CTF 151	US-led coalition of forces	January 2009 – present
6	Individual deployments of States	Individual States	Differs per State

Table 3.1. Counter-piracy operations off the coast of Somalia since 2008

3.2. The Israeli interception operations

The four strands on the evolution of maritime interception discussed all, in a certain way, are part of a very broad motion of unfolding developments in international affairs. Conflict in Iraq and Afghanistan are interconnected with weapons of mass destruction and terrorism. The latter again hooked into the confrontation with piracy off the coast of Somalia. Instability in the Northern African region was the breeding ground for the Arab Spring that brought the ultimate end of Qaddafi. Maritime interception operations during these developments played an operational level role. On a separate note, Israel has also contributed to MIO with some practice. The Israeli contribution lies both in large scale naval operations and single action against vessels. With regard to the first, operation *Change of Direction* (2006) and operation *Cast Lead* (2009) can be mentioned, both with a significant interception role for its naval forces. In 2006, Israel commenced military operations against Hezbollah, which included establishing a blockade off the coast of Lebanon. The blockade was, albeit in a different legal context, taken over by MTF UNIFIL. In 2009 Israel established a blockade off the coast of Gaza as part of operation *Cast Lead*. Although the naval blockade operations against Hezbollah and Hamas in a way were made more palpable by the prior legal debate that occurred with regard to military operations against Al Qaida (to which the acceptance that military force in a self-defence situation could be used not only

against States but also against non-state actors) it ran up against major protests when in May 2010, Israel boarded the *Mavi Marmara* which had attempted to breach the blockade off the coast of the Gaza. The action resulted in nine dead passengers of the vessel, followed by views of many legal commentators.[199] As of 2015, the Gaza blockade is still in force. Israel also intercepted the *Karine-A* (2002),[200] the *MV Francop* (2009),[201] and the *Klos-C*[202] (in 2014), all of which were considered to be a threat to Israel.

3.3. Final remarks

In 1995 Zeigler wrote that,'Multinational interception operations are a creature of the post-World War II era, and rely on the United Nations Charter for their justification'.[203] Although maritime interception operations are now indeed firmly established as a means to enforce decisions of the UNSC, at this point in time it is clear that a different conclusion must be drawn with regard to the legal justifications for MIO. The term MIO has gradually outgrown its original meaning and undertook an evolution

[199] E.g. J. Farrant, The Gaza Blockade incident and the modern law of blockade', in *Naval War College Review*, vol. 66, no. 3 (summer 2013), 81-98; W. Heintschel von Heinegg,'Methods and means of naval warfare in non-international armed conflicts', in *International law studies*, vol. 88 (2011), 211-236; D. Guilfoyle,'The Mavi Marmara incident and blockade in armed conflict', in *British Yearbook of International Law*, Vol.81 (2010), 171-213; J Kraska,'Rule selection in the case of Israel's naval blockade of Gaza: law of naval warfare or the law of the sea?', in In M.N. Schmitt (red.) *Yearbook of humanitarian International Law*, vol. 13 (2010), 367-395; R. J. Buchan, 'Determining the legality of Israel's interception of the peace flotilla on May 31 2010', in *International and Comparative Law Quarterly*, vol.61 no. 1 (2012), 264-273; G.M. Scott, Israel's seizure of the Gaza-bound flotilla: applicable laws and legality', in *Research paper no. 42/2010, Osgoode Hall Law School.*

[200] In 2002, Israeli defense forces boarded the Tonga flagged vessel *Karine-A*, which carried 50 tons of weapons, suspected to be for the Palestine authority. See Hodgkinson, 623-625.

[201] On 3 November 2009, Israel boarded the *MV Francop* which sailed under the flag of Antigua and Barbuda. Israel found more than three hundred tons of weapons on board, according to Israel said to be meant for Hezbollah. The vessel was directed to Ashdod Port for further examination. The weapons shipment was said to originate from Iran. In a letter to the UNSG Israel stated that the shipment constituted a breach of SC-Res. 1747 and because of: "The intended route of the *Francop* - coupled with the types of weaponry found on board - raise serious concerns that this incident also constitutes a violation of UN Security Council Resolution 1701 and 1373." Letter to UNSG Ban Ki Moon by Ambassador Shalev, 4 November 2009. Available at:
http://mfa.gov.il/MFA/InternatlOrgs/Issues/Pages/Israel-submits-letter-of-complaint-to-UN-Secretary-General-5-Nov-2009.aspx.

[202] In March 2014, Israel boarded the Panama-flagged *Klos-C* on suspicion of carrying a large bulk of weapons (surface-to-surface rockets) in the Red Sea on its way to the Sudan, ultimately destined for the Gaza in an operations codenamed operation *Full Disclosure*. The vessel was diverted to Eilat and the crew members released, who, according to an Israeli spokesman, were probably not aware of the cargo.

[203] D. Zeigler, *Ubi Sumus? Quo Vadimus? Charting the Course of Maritime Interception Operations*, Newport, Naval War College Paper, 1995, p. 38 (see also *id*., Vol. 43 *NLR* 1996, pp. 1-55).

from a term used for the legal framework of enforcing UN-economic sanctions to be used today in a much broader sense. It has, therefore, also lost its earlier specific legal meaning as being maritime interception operations that occur only in the context of an authorization of the UNSC. The legal justification for MIO must now also be sought in other sources of general international law. What this short history has also shown is that the scope of the MIO has broadened to include the interception of individuals. Persons have a legal impact on MIO because they bring with them another legal regime: international human rights law, together with its operational challenges at sea. Lastly, what may also be drawn from this short history is that in the maritime dimension different legal bases and subsequent applicable legal regimes may simultaneously exist in a certain maritime area, conducted by naval forces from sometimes the same State. It poses both challenges for the warship commander and the merchant vessels that are subject to interception to understand what is legally permissible in a specific interception situation at sea. Before Part II will examine the generally accepted legal bases for MIO, Chapter 4 will first underline the fundaments of the international law of the sea that relate to MIO, which must be the starting point for any discussion on the legal aspects of maritime interception operations.

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Fig. 2.1.: MIO conducted in the Western, Middle East and African Hemisphere[204]

CMF MSO	Combined Maritime Forces Maritime Security Operations
MIF:	Maritime Interception Force
MTF UNIFIL:	Maritime Taskforce UNIFIL
OAE:	Operation Active Endeavour
OAE STROGOPS:	OAE Strait of Gibraltar operations
OAP:	Operation Allied Protector (I and II)
OCD:	Operation Change of Direction
OCL:	Operation Cast Lead
OEF:	Operation Enduring Freedom
OIF:	Operation Iraqi Freedom
OOS:	Operation Ocean Shield
OUP:	Operation Unified Protector

[204] Source of the ground-map:
http://facweb.bhc.edu/academics/science/harwoodr/geog105/study/nafrica.htm.

CHAPTER 4

The right for warships to intervene on foreign flagged vessels on the high seas

Iure gentium quibusvis ad quosvis liberam esse navigationem.[205]
-Hugo de Groot

4. Introduction

Intervention by warships on foreign flagged vessels can include the stopping, boarding and possible confiscation of goods and detainment of persons. The legal bases and regimes for such an intervention by warships on foreign flagged vessels must not be sought solely within the context of the international law of the sea. The international law of the sea does, however, provide the fundamental legal framework and ground principles with regard to jurisdiction over vessels at sea. It is the logical point of departure for understanding the law applicable to maritime interception operations.

4.1. Fundamental principles of the international law of the sea

It is well known that the fundaments of the legal order of the seas as we understand them today, which are codified in the UN Convention on the Law of the Sea (UNCLOS) and considered as customary international law, go back to the seventeenth century debate between the concepts of *Mare Liberum* versus *Mare Clausum.*[206] The *Mare Liberum* approach to

[205] "That by the law of nations navigation is free for everybody to whomsoever". Title of the first chapter of Hugo de Groot's *Mare Liberum*.
[206] A.C.G.M. Effyinger (ed.), *Compendium volkenrechtsgeschiedenis* (1991), 82-87. After the boarding of the Portuguese vessel *Santa Catharina* by the Dutch Admiral Jacob van Heemskerk in 1603, Hugo de Groot was asked to legally justify boarding and seizure of the vessel. Accordingly, he wrote a dissertation on prize law. His view on the freedom of the seas, which was Chapter 12 of this dissertation, was edited to an independent publication which was published in 1609. The *Mare Liberum sive*

the legal order of the oceans, underlines the importance of the freedom of the high seas. This idea, by which States cannot have exclusive right of ownership over the seas as the seas and its resources are a common good for common use to all, was predominantly instigated by the Dutch lawyer Hugo de Groot (1583-1645).[207] His view ultimately gained the upper hand and has since served as the basis for the legal order of the oceans. In his time, the high seas were all the seas, except those that were regarded as internal waters.[208] Obviously today, although De Groot's idea is still the point of departure, the high seas have gradually lost terrain to other maritime zones over which States possess sovereignty or exercise sovereign rights. The freedom of the high seas is now codified in Article 2 of the Convention of the High Seas (HSC) and in Article 87 UNCLOS.[209] The effect of the existence of the freedom of the high seas is the notion that States do not possess sovereignty beyond their own territory. What follows, is that in the contemporary law of the sea States only may exercise jurisdiction over foreign flagged vessels within their territory and in areas where they may exercise functional jurisdiction for particular purposes, and absent of a legal basis they may not board a foreign flagged vessel in areas where high seas freedoms exist.

Next to the principle that no State can own and exercise jurisdiction over the high seas, the other fundamental principle in the international law

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de iure quod batavis competit ad indicana commercial dissertatio was first published anonymously, but soon afterwards it became known that it was Hugo de Groot who had written it. Jeroen Vervliet,'General Introduction', in Hugo Grotius, *Mare Liberum 1609-2009* (Brill, Leiden Boston 2009), IX. *Mare Clausum* refers to a publication of John Selden in 1635 in reaction to De Groot's work in which he argues that the sea is not common to all under every circumstance.

[207] The *Mare Liberum sive de iure quod batavis competit ad indicana commercial dissertatio* was published in 1609. It was first published anonymously, but soon afterwards it became known that it was Hugo de Groot who had written it. Jeroen Vervliet,'General Introduction', in Hugo Grotius, *Mare Liberum 1609-2009* (Brill, Leiden Boston 2009), IX.

[208] Rothwell and Stephens, 145.

[209] Art. 87 UNCLOS reads:

> 1) The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
> (a) freedom of navigation;
> (b) freedom of overflight;
> (c) freedom to lay submarine cables and pipelines, subject to Part VI;
> (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
> (e) freedom of fishing, subject to the conditions laid down in section 2;
> (f) freedom of scientific research, subject to Parts VI and XIII.
> 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

of the sea is the so called 'flag-principle'.[210] Where the first principle focuses on the use of the sea, this principle focuses on the users. It submits that all States are entitled to exercise jurisdiction over vessels and take measures to safeguard the freedom of navigation against vessels that are registered in that State and flying its flag. In other words, although no State can exercise jurisdiction on the high seas, States do have jurisdiction over vessels that are flying their flag. Moreover, the responsibility of jurisdiction over vessels on the high seas falls exclusively, as codified in Article 92 UNCLOS, to the flag State. This principle has, as Gavouneli mentions; is the cornerstone on which the public order of the high seas is erected.[211]

Although not a principle of international law that is exclusively particular to the law of the sea, a third principle of importance in the context of MIO is the non-intervention principle. Apart from the view that non-interference by States on foreign flagged vessels follows from the flag principle, it is also supported by the non-intervention principle in general international law, in which States need to refrain from actions that are essentially within the domestic jurisdiction of a State. The non-intervention principle, therefore, sets an extra hurdle against rushing into affairs on board foreign vessels that belong to another State. This principle applied in the maritime context underlines that interference by States over foreign flagged vessels should be seen as an exception to the rule.

In sum, in the context of maritime interception operations, these three principles result into two fundamental legal points of departure. First, flag States have exclusive jurisdiction over their vessels on the high seas and other States may, therefore, not interfere with those vessels. Second, if a State decides to interfere with foreign flagged vessels by means of its warships, it will need a proper legal basis to do so. The key article in which these fundamentals are codified is Article 92 UNCLOS, which will receive some more detailed attention in the next paragraph.

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[210] Somewhat confusing in the military context may be that the flag principle has in fact two meanings. First is the meaning in the maritime context, as is mentioned here. Second is the principle that wherever soldiers will go, their national laws will follow them. This principle is usually supported by the Napoleonic maxim: *La ou est le drapeau, là est la France.* When, for instance, military are deployed as vessel protection detachments (VPD) on foreign merchant vessels, both meanings of the flag-principle apply; one to the vessel and one to the military.

[211] M. Gavouneli, *Functional jurisdiction in the Law of the Sea.* Publication on Ocean Development, vol. 62 (2007), 162.

4.1.1. Article 92 UNCLOS

UNCLOS has codified the flag-principle in Article 92 UNCLOS.[212] The core sentence in Article 92 for the purpose of this chapter is: "shall be subject to its exclusive jurisdiction on the high seas". This sentence contains four elements that need brief attention.

The first element of importance in this phrase is *jurisdiction*. As Malcolm Shaw states, jurisdiction is a vital and central feature of state sovereignty which 'concerns the power of the State to affect people, property and circumstances and reflects the basic principle of state sovereignty, equality of States and non-interference of domestic affairs'.[213] There are three aspects to jurisdiction which the flag State can enforce over its flagged vessels. First is the power to issue laws applicable to a vessel (prescriptive jurisdiction). Second is the power to enforce these laws (enforcement jurisdiction) aboard the vessel. To illustrate, this means that when a person of a different nationality is on board the vessel, and despite the active personality principle of a State over such person, the flag State will still have jurisdiction to take enforcement measures against such person. Third is the ability of the flag State to bring matters before a domestic court of law (adjudicative jurisdiction).[214] Under Article 92 UNCLOS a flag State has jurisdiction on all three aspects of jurisdiction when its flagged vessel sails on the high seas.[215]

The second element is that this jurisdiction is *exclusive* to the flag State when vessels sail on the high seas. It entails that the flag State is the only State which can enforce jurisdiction over the vessel and everyone on board the vessel. Such was also underlined in the *S.S. Lotus* case brought before the Permanent International Court of Justice (PICJ) in 1927, where the PICJ stated that:

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[212] Art. 92 UNCLOS reads as follows:

> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
> 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

[213] M. Shaw, *International Law* (2000), 452.

[214] See J.E.D. Voetelink, *Strafrechtmacht over Nederlandse militairen in het buitenland* (2012), 15.

[215] In the case of the Netherlands, the Netherlands Criminal Code states in article 3 that the Netherlands Criminal Code is applicable to all persons that are on board a vessel that flies the Netherlands flag. Article 4 of the Netherlands Criminal Procedural Code discusses the competence of the Netherlands courts over a criminal act on board a Netherlands flagged vessel.

> 'It is certainly true that – apart from certain special cases which are defined by international law - vessels on the high seas are subject to no authority except that of the State whose flag they fly'.[216]

As will be noted below more elaborately, it is generally accepted that this exclusiveness has its limits, for example in favour of suppressing universal crimes such as piracy at sea.

The third element is that exclusive jurisdiction only applies on the *high seas*. The high seas are a maritime zone in the oceans which has its particular legal regime. Article 86 UNCLOS provides that the high seas are: all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. As such, in this area, as Churchill and Lowe mention: From the rule that no State can subject areas of the high seas to its sovereignty, or indeed its jurisdiction, it follows that no State has the right to prevent ships of other States from using the high seas for any 'lawful purpose''[217]. Although strictly speaking the EEZ is not part of the high seas, Article 58 UNCLOS extends the freedom of the high seas onto the EEZ, under the condition that States shall have due regard to the rights and duties of the coastal State. Sub 2 of Article 58 states that Articles 88 to 115 apply the EEZ, which includes the freedom of navigation,[218] the rules relating piracy[219] and the rules relating to the peacetime right of visit.[220] This explains that in naval operations the high seas for practical purposes are usually interpreted as the seas adjacent to the territorial sea and called 'international waters'.[221]

The fourth and last element to note is *its*, which refers to the flag State of the vessel. Article 91 UNCLOS further elaborates on how nation-

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[216] *SS Lotus* case, PICJ, Series A, No. 10, 7 September 1927, 25. The Turkish vessel *Bozkourt* and the French flagged mail boat *SS Lotus* collided on 2 August 1926 on the high seas. Eight persons on board the *Bozkourt* died because of the collision. The Turkish Government prosecuted the French first officer Demons of the *Lotus* for his share in the incident. The question whether Turkey could have jurisdiction over Demons was put before the PICJ. The Court ruled that there was no rule in international law that prohibited Turkey from prosecuting the French lieutenant.

[217] R.R. Churchill, A.V. Lowe, *The law of the sea* (Manchester University Press, 3rd ed, 1999), 205.

[218] Art. 87 UNCLOS.

[219] Artt. 100-107 and 110 UNCLOS.

[220] Art. 110 UNCLOS.

[221] One such example is the NATO-naval operations that were conducted in operation Unified Protector with regard to Libya. The term high seas that was used in SC-Res. 1973, but was interpreted by NATO to mean the seas adjacent to the Libyan territorial sea

ality of vessels can be granted by States. Basically, Article 91 contains two conditions for nationality: registration under domestic rules and a genuine link between the flag State and the vessel. How and under what conditions a State grants a vessel its nationality is subject to the domestic laws of States. With regard to the genuine link criterion, in 1999 the ITLOS issued its judgment in the *MV Saiga* (no.2) case in which the Court had to determine whether the *Saiga* had the nationality of Saint Vincent and the Grenadines at the time of its arrest by Guinea.[222] The Court decided on the point of the genuine link that the genuine link criterion 'is to secure more effective implementation of the duties of the flag State and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States'.[223] Therefore, if there is no genuine link, it does not mean that a vessel has lost its nationality, providing other States the possibility to enforce their jurisdiction over the vessel. The importance of the ability to link a vessel to a State is thus that it creates some level of legal order over vessels in an area that is beyond the jurisdiction of any State, as the link creates a responsibility for the flag State over its vessels. When a vessel flies under a certain flag, the flag State has duties that are summed up in Article 94 UNCLOS. Most importantly in this context is that the flag State must assume jurisdiction under its domestic law over each ship flying its flag and its master, officers and crew.[224]

4.2. Limited exceptions to non-interference

Even though the point of departure for the legal framework of the international law applied to maritime interception operations starts from the notion of non-interference, interference has, however, never been something that was prohibited in its totality. It has always been accepted that States can have reasons to interfere with certain activities on the high seas. Such reasons can fall within the context of international peace and security, to ensure the *bon usage* of the ocean and to maintain the public order and security interest of States.[225] These reasons have a legal impact in the

[222] ITLOS, The M/V "Saiga" (No. 2) case (Saint Vincent and Grenadines v. Guinea), Judgment 1 July 1999. See Chapter 10 on this case.
[223] M/V Saiga, para 83.
[224] Article 94, under 2 sub b UNCLOS.
[225] Papastavridis, 27-40.

sense that it developed legal possibilities by which States can, for instance, interfere with neutral shipping during armed conflict, act against cases of piracy, allow a seaward expansion of functional jurisdiction of coastal States[226] and enter into international agreements. All have an impact on the exclusive jurisdiction over a vessel on the high seas, and as such this has never been completely absolute. During armed conflict certain activities by warships, such as the belligerent right of visit, or capturing vessel that attempt to breach a blockade are well-accepted rules and mark a certain level of clarity of the manner in which way the absoluteness is challenged by other international law frameworks.[227] In peacetime circumstances, the scope of interference of foreign flagged merchant vessels by warships in the past has been open to debate. It surfaces primarily on the issue of whether or not States have a general policing right on the high seas. In 1955 the question of whether State have a general authority of policing the sea was scrutinized by the International Law Committee (ILC) in the context of whether there is a general right of verification of flags by warships. Ultimately, this discussion ended in favour of the position that the ILC accepted flag verification only in special 'police measures' like piracy and slave trade. It rejected, however, a *general* right for a warship to verify the flag of a vessel.[228] This point of view was then for the first time codified in Article 22 of the 1958 Convention on the High Seas[229] and taken over in Article 110 UNCLOS. From this is derived

[226] The 'creeping jurisdiction'-debate of seaward jurisdictional power projection has now reached the EEZ. A development which has obviously been a concern for states with an expeditionary naval force. James Kraska's study elaborates on the coastal state efforts at diminishing freedom of navigation in the EEZ, and thereby the advantage of maritime powers of expeditionary operations, by, as he opines; 'casting doubt on the political and legal legitimacy of military activities in the EEZ. See J. Kraska, *Maritime power and the law of the sea* (Oxford University Press, 2011), Chapter 5, at 221. See also, J.M. van Dyke,'The disappearing right to navigational freedom in the exclusive economic zone', in *Marine Policy*, 29 (2004), 107-121.

[227] The law of naval warfare will more elaborately be addressed in Part 3.

[228] *Yearbook of the International Law Commission* (1955), vol. 1, p. 32.

[229] Article 22 CHS reads:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for
> suspecting:
> (*a*) That the ship is engaged in piracy; or
> (*b*) That the ship is engaged in the slave trade; or
> (*c*) That though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
> 2. In the cases provided for in subparagraphs (*a*), (*b*) and (*c*) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have

that, as McDougal and Burke state; "no general right in warships to verify the flag of vessels ought to be provided apart from that recognized in connection with the Article on the right of visit."[230] The conclusion that can be drawn as a starting point in the international law of the sea, therefore, is that no general policing rights, other than the very limited possibilities in 110 and 111 UNCLOS, exist for warships in peacetime circumstances.[231] These mentioned two exceptions flow from law of the sea. Part 2 will underline that presently, from a broader international law perspective, more exceptions to the exclusive jurisdiction of the flag State exist.

4.2.1. Principles of the law of the sea versus maritime security

Security concerns now have become a reason for more focus and interference with shipping and the freedom of navigation. Whereas UNCLOS does much to enhance maritime security[232], interestingly, the fundamental notions of international law of the sea and the current trend of trying to enhance maritime security do not start from the same points of view. On the one hand, the flag state principle and the principle of non-interference lead to the fact that interference by warships on foreign flagged vessel must be regarded as an exception to the rule, which are very limited in nature. On the other hand, maritime security and the manner in which the enhancement of maritime security is envisaged to be put in practice takes the opposite approach. It starts from the view that possibilities should exist, preferably supported by law, in which other vessels can be controlled, searched and taken action against. Emphasizing on the need for more maritime security, therefore, puts a strain on the basic principles of the international law of the sea. In a broader sense, basically, the discussion here is the classic dilemma of gaining more security by losing more freedom with

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been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

[230] M.S. McDougal, W.T. Burke, *The public order of the oceans. A contemporary International law of the Sea* (Yale University Press, 1962), 890.

[231] These articles deal with the peacetime rights of visit and hot pursuit.

[232] Rothwell and Klein mention for instance the positive impact of clarity on the outer limits of maritime zones, the economic certainty that UNCLOS creates in the EEZ, the general promotion of the peaceful use of the oceans and dispute settlement. D.R. Rothwell, N. Klein, '*Maritime security and the law of the sea', in N. Klein, J. Mossop, D.R. Rothwell (eds.), Maritime security. International law and policy perspectives from Australia and New Zealand* (2009), 22-37, 27-29.

the ultimate aim of protecting those same freedoms. The mentioned tension between the legal principles of non-interference, exclusive jurisdiction and freedom of the high seas versus enhancing maritime security, puts pressure on the principles in a number of ways.

First, in conceptual thinking it appears that the right of visit as an exceptional right is moving in the direction of the thought that the right of visit must not be seen as an exception but rather must be seen as a possibility to enable boarding foreign vessels. This way of thinking strictly does not change anything in the legal sense, but it does change the underlying mindset from exceptions to possibilities. To put this differently: the thinking is shifting from "you cannot board *unless* there is a legal basis", to "you *can* board as long as there is a legal instrument to back you up". Again, it does not step away from the legal situation as it is, but it allows in terms of (political) mindset, perhaps to step quicker or maybe easier towards hollowing these principles.

Second, this shifted thinking is found in the question that deals with how to protect against threats to maritime security. As said, enhancing maritime security departs from the idea that the seas need to be policed in order to successfully protect against threats. As such, in the political and strategic arena phrases like 'policing the seas'[233] and 'securing of the commons[234]' have become fashionable wording in modern naval strategy, outside situations of armed conflict. Because current strategic maritime thinking starts with the aim of trying to control what happens in the seas by means of a higher level of awareness, it is contradictory to the 'Grotian'-principles of the international law of the sea. It insists, from a strategic-political perspective, that the legal notion of very limited policing tasks for States on the high seas must be left behind. The consequence of this area of tension is that States will use naval forces to police at sea, making use of the room or space that, arguably, exists *under* the threshold of what is legally prohibited. In that sense, warships are tasked to actively gather general intelligence on the high seas and make use of 'friendly ap-

[233] E.g. D. Hammicks, 'Navies Endeavour to police the Mediterranean Sea', in *Jane's Navy International*, (July/August 2007), 28-36.
[234] B. Smith-Windsor,'Securing the commons: Towards NATO new Maritime Strategy', *Research paper, NATO Defence College*, no. 49 (September 2009).

proaches'[235] in which crews of warships simply come in contact and chat with the maritime community. Ultimately, this aims to enable timely reaction against any threat against maritime security.[236] Crews come along side or even step aboard other vessels, simply to exchange information with each other. In practise, these "friendly approaches" to enhance maritime security are becoming a standard part of the *modus operandi* of warships. Warships commanders are tasked to 'police' certain maritime areas by communicating with fellow seafarer, conducting friendly approaches, keeping their eyes and radars open to anything that might ultimately be of use to thwart an actual clear and present threat. A large part of the naval operations against piracy is conducted by coming alongside local coastal fisheries vessels to inquire and gather information that may lead to a better situational awareness of the area. On a more sophisticated level Operation *Active Endeavour* has evolved from a platform based operation to a network based operation that tries to tie in all kinds of information in order to close the network of possible terrorist use of the sea. From huge amounts of data anomalies are filtered that may lead to illegal activities. The Combined Maritime Forces (CMF), an about thirty nations-naval partnership, has as part of its task to conduct maritime security operations. Part of these operations is the assist and approach visits in order to maximize general awareness at sea.[237] Policing the high seas adds to maritime security awareness (MSA), which is, therefore, an important part of current naval operations. Conceptually, however, this *modus operandi* does not sit well with the notion that foreign vessels should not be interfered with. This active politico-strategical policy of seeking out vessels at sea in the manner as described above may be under the threshold of intervention with foreign flagged vessels. It has, however, made some authors question whether exclusive flag State jurisdiction and in particular keeping the primary responsibility over vessel with the flag State a legal concept that possibly should today be on its return.[238] Geiss and Tams, for instance,

[235] This term is also institutionalized in the maritime dimension. See e.g. EUNAVFOR operation *Atalanta* (http://eunavfor.eu/mission/) and Combined Maritime Forces (CMF) webpage: http://combinedmaritimeforces.com/2013/07/04/maritime-security-operations-with-france-djibouti-yemen-and-saudi-arabia/

[236] S.C. Boraz, 'Maritime domain awareness. Myth and realities', in *NWCR*, vol. 62 no. 3 (Summer 2009), 137-146.

[237] http://combinedmaritimeforces.com/ctf-150-maritime-security/.

[238] R. Geiss, C.J. Tams, 'Non-Flag States as Guardians of the Maritime Order: Creeping Jurisdiction of a Different Kind?', in, H. Ringbom (ed.) *Jurisdiction over ships* (2015), 19-49; Brown (2015), 70-71.

opine that stepping away from this concept, allows for 'a wider circle of States to enforce international legal rules'.[239]

Third, as will be the main focus of study in Part 2, with the collective security system, international agreements and arguments to use self-defence as a direct legal ground to board vessels, more and more exceptions to the exclusive jurisdiction of flag States over their vessels have been put forward, next to the traditional ones that are derived from the law of the sea. And also the objectives, through an increasing scope of issues brought under maritime security, for boarding foreign flagged vessels have broadened, such as the want of some States find legal ways in order to board vessels that are suspected of carrying WMD. Even before maritime security became a centralized issue in the maritime domain, different authors already commented on the tension between the growing legal possibilities to interfere with the freedom of navigation.[240] Whereas these commentators primarily commented on maritime zones in which the high seas is losing terrain in relation to other maritime zones, other legal grounds to board foreign flagged vessels, is nibbling at the rights of States with regard to the vessels at sea. These other legal frameworks may also have an eroding effect on the principle of non-interference by warships of foreign flagged vessels on the high seas, especially where -lawful- procedures between States are agreed that waive the exclusive jurisdiction of the flag State. This development is not wholly without criticism[241], and usually comes to the fore as part of more strategic debates on the influence of States and their sea power on the ocean.[242] Whereas some put the tension between the fundamental principles and politico-military strategy of States under the magnifying glass, again others, such as Weinberg and Veridame, underline that '[Yet], it would be hasty to conclude that these

[239] Geiss & Tams (2015), 25.

[240] E.g. J.M. von Dyke 'The disappearing right to navigational freedom in the exclusive economic zone', in *Marine Policy*, 29 (2004), 107-121; 'A "New" Exception to the Freedom of the High Seas: The Authority of the U.N. Council', in T.D. Gill and W.P. Heere (eds.), *Reflections on the Principles and Practice of International Law: Essays in Honour of Leo J. Bouchez* (Dordrecht, Nijhoff 2000), 205-211. And more recently; J. Kraska, *Maritime powers and the law of the sea* (Oxford University Press, 2011).

[241] Y-H. Song, The U.S. Led Proliferation Security Initiative and UNCLOS: Legality, implementation, and an assessment', in *ODIL*, vol. 38 (2007), 101-145.

[242] For example in the tensions between the US-Chinese relationship on the influence of the respective states on the use certain areas of the ocean. See e.g. T. Yoshihara,'Chinese views of the U.S.-led maritime order', in J. Krause, S. Bruns, *Routledge Handbook on naval strategy and security* (2016), 351-363.

settled principles of the law of the sea will soon give way to the strategic necessities of powerful States and collective security.'[243]

[243] V. Becker-Weinberg, G. Veridame,'Proliferation of weapons of mass destruction and shipping interdiction', in M. Weller (ed.), *The Oxford Handbook on the use of force in international law* (2015), 1017-1033, at 1033.

Introduction to Part II

Part I aimed at setting the stage for further examination of the law applicable to maritime interception operations. After the introduction, general remarks were made in Chapter 2 on naval operations in connection positioning the navies' role in maritime interception. Furthermore, it mentioned some basic elements that are specific to operating in the maritime environment. The evolution of the term MIO was then elaborated upon by means of a short contemporary history of MIO in Chapter 3. Chapter 4 briefly underlined the fundamental principles central to maritime interception operations which serve as the starting point of any discussion on this subject. It has underlined that the legal point of departure is that States cannot interfere by means of their warships with foreign flagged vessels in maritime areas outside the territorial jurisdiction of a State, unless there exist a legal ground to do so. The chapters of Part I have shown that over the last 25 years the role of naval forces has expanded beyond the national defence role into an active role in the maintenance of international peace and security, which has further developed into a strategic concept of operations in which an active form of policing the high seas is sought after and where interference with foreign shipping in the commons and the maritime community is not seen as exceptional, but rather as the key to enhance maritime security. Consequently, the term MIO has undergone an evolution which has resulted in the now generally accepted view that the term MIO is an operational term of art, rather than a legal term. Alongside this evolution, from a legal perspective to an operationally orientated one, more legal bases have come to be accepted upon which to base maritime interception operation on general international law, than solely the limited exceptions in the realm of the international law of the sea. This subject will be the main subject of study in Part II. In terms of legal regimes, the evolution from stopping goods to include also persons puts a focus on the

applicability of human rights law. This will be more elaborated upon in Part III.

Part II will venture into the study of legal bases for maritime interception operations. As MIO are considered in the context of conducting military naval operations, two different approaches can be taken to analyse the subject. The first approach is along the lines of the exceptions to the prohibition on the use of force in international relations as stated in Article 2(4) of the UN-charter.[244] Two generally accepted exceptions to the use of force exist: the use of force based on the UN-collective security system and the right of self-defence. The second approach is along the lines of state sovereignty, in which a State can make exceptions to its own exclusive jurisdiction over its vessels and its territory, by way of State consent; either *ad hoc* or through treaties. As such these can be considered as legal bases for interception operations. Part II, therefore, considers four legal bases for MIO in four separate chapters: the use of collective measures within the context of the UN-collective security system, self-defence, *ad hoc* consent and international agreements.

Chapter 5 will analyses maritime interception operations within the context of the UN-collective security system. It will first categorize the different types of interception operations that can be undertaken within the UN-collective security system and then focus on the so-called Article 41/ 42 debate. Chapter 6 will consider self-defence as legal basis for MIO. This chapter will focus on two different contexts in which the law of self-defence is argued to be a legal basis for maritime interception: large scale naval operations after having invoked Article 51 of the UN-Charter, and single actions to stop WMD and non-state actors. Chapter 7 considers *ad hoc* consent as a legal basis for MIO, in particular with regard to the master's and State consent debate and touch upon the issue of statelessness of vessel within the context of MIO. Finally, Chapter 8 will consider international agreements as a legal basis for MIO. It will consider UNCLOS, the SUA and its 2005 Protocol and the bilateral treaties between the US and other States made within the context of PSI.

[244] Article 2 (4) UN-Charter reads:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.

PART II:

Legal bases for maritime interception operations

CHAPTER 5

The UN-collective security system and maritime interception operations

The only prediction that can be made with assurance is that the lower the level of conflict, the more localized the situation and the more restrictive the objectives, the more predominant will be the element of law in the governing of naval conduct.

D.P. O'Connell – The influence of law on sea power[245]

5. Introduction

This chapter will consider the UN-collective security system as a legal basis for maritime interception operations. The collective security system providing the framework for MIO has for a while been the primary legal basis connected to the term maritime interception operations. Despite the emergence of other legal frameworks for MIO, the collective security system remains one of the most important legal bases for MIO. Most recently, the system has provided for a legal basis for operation *Unified Protector* (2011) with regard to the operations against the Qaddafi-regime in Libya,[246] and is still partly facilitating counter-piracy operations off the coast of Somalia. Maritime enforcement measures mandated by the UNSC can be divided into two types. The first type is the authorization of UN-mandated maritime *embargo* operations (MEO). MEO are specifically focused on the enforcement of economic sanctions at sea which are adopted by the UNSC. In the second type of maritime enforced measures, the UNSC authorizes the use of armed force that is not related to economic sanctions under Article 41. An example is the case where the UNSC au-

[245] D.P. O'Connell, *The influence of law on sea power* (Manchester University Press, 1975), 3.
[246] More recently with regard to Libya, in March 2014, the UNSC adopted another resolution (SC-Res. 2146) that allowed for stopping crude oil that is illicitly being exported from Libya.

thorizes *all necessary means* to enforce a UN-mandate, which translated to actual military operations, could involve a MIO. These two types may also exist concurrently in one military campaign. An example from practice is the 2011 Libya-operation. During this operation, maritime forces were used both as MEO-assets and for the mandate to *use all necessary means* to protect civilians.

Maritime enforcement measures mandated by the UNSC are often referred to as "UN-mandated" maritime interception operations. In fact, 'UN-mandated' refers to the command and control under which the operations are carried out. Carvalho de Oliveira has made a clear distinction between so called UN-mandated and UN-controlled naval operations. With the first, he refers to the fact that; 'The UN issues the resolutions but leaves the operational control in the hands of States, regional organizations or international coalitions'. With the latter, he refers to operations in which, 'The Secretary-General assumes direct control of operations.'[247] Maritime interception operations based on the UN-collective security system can include both UN-mandated and UN-controlled operations. To illustrate, the 2011 Libya-operations were UN-mandated because the UNSC authorized military operations that were operationally controlled by NATO[248] and also for a short time by a coalition of States[249]. The MIO conducted in the context of UNIFIL is UN-controlled as it is under the operational control of the UN itself. Interestingly, this is the only naval operation that has have ever been directly controlled by the UN itself.[250] Although MIF-operations are sometimes also called 'UNMIF' and parts of the Korea War naval operations have been referred to as 'UNBEF',[251] neither of them were under operational control of the UN itself. These names, however, must be seen in the context of the period in which they were conducted and merely referred to the fact that they were in fact sanctioned by the UN through a UN-resolution. This thesis will follow Carvalho de Oliveira's framework of distinction with regard to the command and control of MIO undertaken within the collective security system.[252] This

[247] Carvalho, 53.
[248] Operation *Unified Protector*.
[249] Operation *Odyssey Dawn*.
[250] Rather uniquely for naval operations, the UN-beret is worn by the military on board the MTF-UNIFILwarships.
[251] United Nations Blockading and Escorting Force.
[252] Rothwell and Stephens introduce the term "UN-sanctioned naval operations" to refer to all the naval operations authorized by the UNSC Although a good term to encapsulate all, the term may be

chapter will first briefly introduce the UN-collective security system and will then consider the two types of maritime enforcement measures that can be mandated by the UN-Security Council.

5.1. The UN-collective security system

The UN-collective security system is the legal basis for the UNSC to exercise its powers under Chapter VII of the UN-Charter. The system takes as the obvious point of departure the use of force prohibition ex Article 2(4) of the UN-Charter and provides for a stepped approach of non-military and/or military measures to restore international peace and security.[253] The system centralizes around Chapters VI and VII of the UN-Charter. Chapter VI concerns the peaceful settlement of disputes and Chapter VII includes taking coercive measures including the use of armed force. The essential difference between Chapter VI and VII is that measures taken under Chapter VI do not include coercive powers, whereas measures taken by the UNSC under Chapter VII, through Article 25 of the UN-Charter, are coercive in nature.[254] The key articles in Chapter VII are Articles 39, 41 and 42. Article 39 of the Charter is the obligatory stepping stone for taking coercive measures under Chapter VII. When a threat to peace, breach to peace or act of aggression exists, this article opens the door to the authorities that are contained in Articles 41 and 42 of the UN-Charter.[255]

Based on Article 41, the UNSC can take non-military measures, such as economic sanctions. If these measures prove to be or would be inadequate under the circumstances to deal with the issue at hand, the UNSC can decide to take measures based on Article 42, which provides authority to make use of armed force to restore international peace and security. Although only Article 42 allows for the use of armed force, that is not to

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somewhat confusing, as part of these UN-sanctioned naval operations could also be naval operations to enforce UN-sanctions. D. R. Rothwell, T. Stephens, *The international Law of the Sea* (2010), at 262-263.

[253] T. Gazzini, *The Changing rules on the use of force in international law*, (2005), 7.

[254] Article 25 UN-Charter reads:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

[255] Article 39 reads:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

say that under Chapter VI and the other articles of Chapter VII no military *forces* can be deployed. Clearly, this has often been the case. Therefore one cannot say that the deployment of military forces by itself amounts to an Article 42-operation. Forces that are deployed under Chapter VI are usually called upon within the context of UN-peacekeeping operations and have particular features in their authorities and mandate. In particular, such forces need the consent of a nation to operate on their territory, are required to adhere to the principle of impartiality, and are restricted to self-defence in their use of force.[256] Force deployed under Chapter VII of the UN-Charter are often categorized as peace-enforcing operations that bear a different legal feature than Chapter VI operations in the sense that they do not need the consent of the target state, can be authorized to use force and are not necessarily impartial.

5.2. Maritime embargo operations

In seven situations the UNSC has authorized maritime embargo operations to enforce economic measures at sea: Southern Rhodesia,[257] Iraq,[258] The Former Yugoslavia,[259] Haiti,[260] Sierra Leone,[261] Lebanon[262] and Libya.[263] Maritime embargo operations aim at implementing economic sanctions adopted by the UNSC at sea. That the enforcement of the embargo physically takes place at sea, distinguishes it from UN-sanctions adopted by the UNSC that do not also authorize enforcement at sea, and which are restricted to implementation under national jurisdiction. Rather than only relying on national implementation of sanctions by member-states within their respective jurisdictions, maritime embargo operations add another, physical, dimension at sea directly against a sanctioned State and within the theater of conflict itself. Arguably, maritime embargo operations can be considered as a step between economic sanctions and military en-

[256] T.D. Gill, 'Peace operations', in T.D. Gill, D. Fleck (eds.), *The handbook of the international law ofmilitary operations* (2010), 135-142. With regard to the term self-defence within the context of UN-peacekeeping operations it must, however, be noted that an evolution of the notion of self-defence has taken place in which it has gained a much broader meaning than that of the strict self-defence in the context of criminal law.
[257] SC Res. 217 (1965), 221 (1966), 232 (1966) and 460 (1979).
[258] SC Res. 661 (1990), 665 (1990), 670 (1990), 687 (1991) and 1483 (2003).
[259] SC Res. 713 (1991), 757 (1992), 787 (1992) and 820 (1993).
[260] SC Res. 841 (1993), 861 (1993), 873 (1993), 875 (1993) and 944 (1994).
[261] SC Res. 1132 (1997) and 1940 (2010).
[262] SC Res. 1701 (2006).
[263] SC Res. 1970 (2011), 1973 (2011), 2009 (2011) and 2040 (2012).

forcement operations in order to more pressure on the target state. But it can also be seen as a part of the military enforcement measures. Which one it may be or draws closes to, obviously depends on the actual circumstances in which the UNSC has authorized such activity. Since the UNSC authorized military means to implement economic sanctions at sea debate has arisen on whether these military operations, and the use of force used in pursuit of the mission, is based on either Article 41 (economic enforcement measures) of the UN Charter, or should be positioned within the context of Article 42 (military enforcement measures).[264] The '41/42' debate first arose during the imposition of economic sanctions against Iraq, after the Iraqi invasion of Kuwait in 1990. Sanctions against Iraq and their implementation at sea by the maritime interception force (MIF) lasted until the UNSC adopted, in May 2003, SC-Res 1483 (2003) that ended the sanctions regime.[265] In the years following the Iraqi experience interception operations were also conducted during the conflicts in the former Yugoslavia, Haiti and Sierra Leone. Although these maritime embargo operations made the implementation of economic sanctions at sea an accepted practice, it continued to stir the discussion on the legal basis for the naval enforcement of economic sanctions. In the maritime embargo operations that followed, during the conflicts in Lebanon and Libya, the debate did not, however, resurface. Klein has also briefly touched upon the issue but has not added a contemporary view of her own.[266]

The debate on the legal basis for naval enforcement at sea is especially relevant from a naval operator's perspective. At the operational level the core issue is whether naval forces that are deployed in maritime embargo operations to oversee and implement economic sanctions imposed at sea can resort to coercive measures, including the use of force. Do commanders of warships need flag State authority to board a vessel, or can they base their powers on the mandate of the UNSC? Can so-called disabling

[264] See Soons; G.P. Politakis, 'UN-Mandated Naval Operations and Notion of Pacific Blockade: Comments on Some Recent Developments', 6 *Revue Africaine de Droit International et Comparé* (1994), 173-208; N.J. Schrijver, 'The Use of Economic Sanctions by the Security Council: An International Law Perspective', in H.H.G. Pos (ed.), *International Economic Law and Armed Conflict* (1994), 153-154; L.E. Fielding, 'Maritime Interception: Centrepiece of Economic Sanctions in the New World Order', 53 *Louisiana L Rev.* (1992-1993), 1191-1241; R. Mclaughlin, 'United Nations Mandated Naval Interdiction Operations in the Territorial Sea?', 51 *ICLQ* (2002), 249-278.

[265] J. Goldrick, 'Maritime Sanctions Enforcement against Iraq, 1990-2003', in B.A. Elleman and S.C.M. Paine, (eds.), *Naval Blockades and Seapower. Strategies and Counter-strategies, 1805-2005* (London, Routledge 2006), 201-214.

[266] Klein (2011), 276-280.

fire be used when a vessel refuses to comply with the warship's crew who are executing a UN mandate, or are actions only limited to monitoring and reporting? These are just a few examples of practical questions which make understanding the legal basis and legal regime under which they operate a significant issue for military practitioners. As McLaughlin states: 'It is thus essential that we understand how Article 40, 41 and 42 interact, because it is this interaction which defines the spectrum with which UN mandated interdiction can take place.'[267]

The next paragraphs consider the question of the legal grounds for maritime embargo operations that are utilized to implement economic measures adopted by the UNSC. To analyse this question this Chapter will first argue that maritime embargo operations can broadly be categorized into two types of operations, namely *implied* and *explicit* maritime embargo operations. Second, it reassesses the main arguments of the 41/42 debate, primarily against the background of the present-day application of Article 42. It will argue that the applicability of Article 42 has evolved in such a manner that the existing reluctance in the mid-1990s concerning the possibility to position maritime embargo operations within Article 42 may now be less strong. Lastly, a few remarks are made concerning the question of whether or not the use of force within the realm of Article 41 is possible in the context of maritime embargo operations.

5.2.1. Two types of maritime embargo operations

The UNSC has made much use of the ability to impose sanctions based on Article 41 of the UN Charter. The first sanctions ever to be adopted by the UNSC were the sanctions against Southern Rhodesia in 1966, which was also the first time that a maritime interdiction operation, the so-called Beira Patrol, supported the implementation of sanctions.[268] Article 41 reads as follows:

> 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal,

[267] McLaughlin (2002), 253.
[268] V. Gowlland-Debbas, 'Sanctions Regimes under Article 41 of the UN-Charter', in V. Gowlland-Debbas, ed., *National Implementation of United Nations Sanctions. A Comparative Study* (Leiden, Martinus Nijhoff Publishers 2004), 3-33, at 7.

telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

Many of the sanctions imposed by the UNSC have coincided with the conduct of military peace support operations. Although some authors have suggested that the effectiveness of sanctions also depends on the willingness of States to use coercive measures, such as the use of military force,[269] most[270] of the UN-sanctions are adopted without implementation instruments that include the use of military means. Following the traditional division between Article 41 and 42 UN Charter, sanctions imposed through Article 41 have in fact very little to do with the use of military means, but form a crucial and mandatory pre-step in restoring international peace and security to what is considered to be the *ultimum remedium*: action through military means as is provided for in Article 42. Maritime strategist Geoffrey Till has argued that imposing maritime operations to enforce economic sanctions does not force the targeted State to change its policy. He claims that the relevancy of MEO on a political level is gained rather by the fact that it shows that everything possible has been undertaken to avoid to compelling compliance through the use of military force.[271]
On a number of occasions States have decided to deploy naval assets at sea to support the economic sanctions, either at the express authorization of the UNSC, but also without express authorization. Broadly speaking, two types of maritime embargo operations can be distinguished: *Implied* maritime embargo operations and *explicit* maritime embargo operations. The key difference between these two types is whether the UNSC has explicitly authorized the implementation of economic sanctions at sea. These two types of embargo operations will be considered in more detail below.

5.2.1.1. Implied maritime embargo operations

In the past, the UNSC has adopted a number of resolutions that were based on Article 41 in the context of which the international community

[269] C. De Jonge Oudraat, 'Making Sanctions Work', 42 *Survival* (2000), 105-127 at 112.
[270] Some implementations of sanctions also relied on the presence of a peace support operation for their implementation. See, e.g., SC Res. 1609 (2004), para. 2(m), concerning Cote D'Ivoire, in which French forces were also authorized to monitor and inspect, without notice, the cargo of any transport vehicle breaching the imposed sanctions.
[271] Till (2013), 237.

took the initiative to deploy naval forces.[272] Although the political developments in these cases may have been such that States or regional organizations were politically expected or even asked by the UN to deploy military means to support the decisions of the UNSC, the point to note in these resolutions is that the UNSC did not specifically adopt military measures to implement sanctions from the sea. These military operations, launched without express authorization from the UNSC to support adopted economic sanctions from the sea, can be called implied maritime embargo operations. From the wording of the resolutions it does not become apparent that the UNSC actually seeks, or authorizes any enforcement of economic sanctions at sea. The target audiences of the resolutions are the member states which, pursuant to Article 25 of the UN Charter, are obliged to take measures to implement the decisions of the UNSC. These resolutions aim to seek implementation through national procedures, rather than through military means at sea. Two examples of implied maritime embargo operations can be given:

In the case of Southern Rhodesia the UNSC adopted SC resolution 217 (1965), shortly after SC resolution 216 (1965) condemning the unilateral declaration of independence by the Ian Smith Government. Although with SC-resolution 217 the UNSC did not as yet take the step of mandatory economic measures under Chapter VII, the UK (the former colonial power) launched the Beira Patrol.[273] Mobley mentions that the resolution '[w]as to serve as the original (if flimsy) legal justification for later British maritime intercept operations, giving the United Kingdom reason to expect the cooperation of the flag States of suspect tankers'.[274]
In the second example, during the crisis in the former Yugoslavia, in July 1992 NATO and the Western European Union (WEU) decided to launch Operation *Maritime Monitor* and *Sharp Vigilance* in support of SC resolu-

[272] SC Res. 713 (1991) and SC Res. 757 (1992) on the former Yugoslavia; SC Res. 217 (1965) on Southern Rhodesia. In the case of SC Res. 661 (1990) it was disputed whether naval forces were operating under this resolution, or that the authorities were based on the legal regime applicable in cases of self-defence.
[273] SC Res. 460 (1979) ended the sanctions with regard to Southern Rhodesia, just before Zimbabwe emerged as a new state in 1980.
[274] R. Mobley, 'The Beira Patrol. Britain's Broken Blockade', 55 *NWCR* (2002), 64-84. Mobley also mentions that: 'in the early weeks of the operation London was required in that time to approach the tankers' flag countries and arrange to stop and board the ships, if necessary; with the passage in April of Security Council Resolution 221, Britain would no longer have to secure this approval'. See also p. 71 on which he states that specific flag state consent was needed within the context of SC Res. 217 before an interception took place.

tions 713 (1991) and 757 (1992) to contribute to the monitoring of sanctions adopted by the UNSC.[275] Neither resolution contained any explicit authority for naval enforcement, but merely decided (713) that under Chapter VII 'all States shall … immediately implement a general and complete embargo on all the deliveries of weapons and military equipment to Yugoslavia'. Resolution 757 added the mandate for States to implement SC-res. 713, but only within their jurisdictional powers.

In 2011, a third example almost came into being: during the early stages of the Libya crisis NATO Secretary-General Rasmussen announced that NATO would set up an embargo operation to monitor UN-sanctions that were adopted in SC-Res. 1970 (2011). This resolution was expressly based on Article 41[276] and did not contain any explicit authority to deploy naval forces to enforce the embargo with the use of armed force at sea.[277] As the situation developed, however, NATO actually started its military operations only after the UNSC adopted SC-res. 1973 (2011) that authorized explicit enforcement authority on the high seas.[278] If SC-resolution 1973 would not have contained this authorization and if NATO would have gone ahead with the deployment of naval forces off the coast of Libya, then deploying warships at sea to support a UN-resolution would have been a case of implied maritime embargo operations.

5.2.1.2. Legal basis for implied maritime embargo operations

If the maritime implementation of economic sanctions is not mentioned in the resolution, the question arises as to whether implied maritime embargo operations are actually *mandated* by the UN, or are set up in order *to support* UN decisions. It seems hard to see how a resolution can be a legal basis for maritime embargo operations if there is no mandate in the first

[275] NATO Operation Maritime Monitor, available at: <www.manp.nato.int/NAVSOUTH/OperationMaritimeMonitor.htm> (visited February 2013).
[276] UNSC Res. 1970 (2011) reads: 'Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41'.
[277] E. MacAskill and I. Traynor, 'Libya: NATO defence ministers agree on minimal intervention. Victory for US as agreement to move warships closer to Libya falls far short of measures called for by Britain and France', *The Guardian*, 10 March 2011. At: www.guardian.co.uk/world/2011/mar/10/libya-gaddafi-nato-us-minimal-intervention.
[278] See more elaborately on the Libya maritime embargo operation: M.D. Fink, 'UN-Mandated Maritime Arms Embargo Operations in Operation Unified Protector', 50 *Military Law and the Law of War Rev.* (2011) pp. 1-24.

place. If States take the initiative to deploy naval forces in support of measures taken under an Article 41 resolution that has no wording indicating that economic sanctions can also be implemented at sea, and secondly, for which the UNSC usually decides that States shall take steps to prevent by *their nationals* or from *their territory* or using *their flagged vessels* certain embargoed actions that do not go beyond the jurisdictional reach of a State and excludes foreign flagged vessels,[279] the resolution itself may not actually be the proper legal basis, but might only serve as an argument to politically justify or to legitimize the presence of naval forces off the coast of a State which is subjected to sanctions. The decision to deploy naval forces to sea should then be sought outside Chapter VII of the UN Charter, such as the decision of a regional organization to deploy military means, made possible because of the notion of freedom of navigation on the high seas. This allows States to deploy naval forces at sea on their own initiative without any further decisions from the UNSC, or the consent of a State and without crossing third-state boundaries. The actual presence of naval assets is made possible because of the rules applicable to the different maritime zones, but is not based on explicit authorization by the Council or the consent of a State. Consequently, no enforcement authority is given to naval forces to implement economic sanctions at sea. In the absence of explicit authorization, their powers are basically restricted to monitoring and reporting. Still, however, even in a diplomatic coercion role, as Booth mentions, warships are in support of foreign policy, 'but by means of signaling rather than shooting'.[280] Zeigler mentions that the information that was reported by NATO and the WEU maritime operations during the Yugoslavia conflict 'provided sufficient information about violations to enable … the Security Council … to pass resolution 787',[281] which gave explicit authority to enforce sanctions at sea. McLaughlin views implied maritime embargo operations, which he calls 'passive naval action', more as a form of diplomatic coercion which is 'encompassed in a modern form by the peaceful settlement provisions of UN Chapter VI'.[282]

[279] See e.g. SC-Res. 757 (1992), para. 4(c); SC-Res. 1701 (2006), para. 15; SC-Res. 1970 (2011), para. 11.
[280] K. Booth, *Law, Force and Diplomacy at Sea* (London, George Allen & Unwin 1985),137.
[281] Zeigler (1996), 33.
[282] R. McLaughlin, *United Nations Naval Peace Operations in the Territorial Sea* (Leiden, Martinus Nijhoff Publishers 2009) p. 128.

5.2.2. Explicit maritime embargo operations

Explicit maritime embargo operations are maritime interception operations that are explicitly mandated by a UN-resolution to enforce an embargo. A clear indication of an explicit mandate to implement economic measures at sea exists when the UNSC uses wording that resembles: 'to hold all inward and outward shipping in order to inspect and verify their cargo and destinations and to ensure strict implementation of…'. This wording has been used in a number of UN resolutions and opens up the possibility to physically stop and board vessels at sea.[283]

SC-res. 665 (1990), with regard to Iraq, for the first time contained the express mandate with the above-mentioned wording that, as McLaughlin notes: 'is [thus] the fundamental conceptual precedent for modern UN naval interdiction operations'.[284] The UNSC used the 'explicit authority'-phrase possibly also to end the ongoing debate on the question as to whether naval enforcement actions against Iraqi merchant vessels were taken based on SC-res. 661 that imposed economic sanctions, or were based on Article 51 of the UN Charter.[285] The Iraqi example was followed in the former Yugoslavia crisis when the UNSC adopted economic measures in which the UNSC explicitly authorized maritime embargo operations in SC resolution 787.[286] The NATO and WEU operations, already present in the Adriatic Sea, changed their type from implicit to explicit with the adoption of explicit authority. Subsequently, NATO and the WEU changed their names for the embargo operations into *Maritime Guard* and *Sharp Fence* to reflect their new authorities. Both operations were later combined into Operation *Sharp Guard.*[287] In the cases of

[283] SC-Res. 665 (1990), 787 (1992), 875 (1993) and 1132 (1997).
[284] McLaughlin (2002), 261.
[285] See, e.g., T.D. Gill, 'De Golf crisis. De volkenrechtelijke regels inzake het gebruik van militair geweld' (The Gulf crisis. The public international law rules concerning the use of military force), 38 *NJB* (*Nederlands Juristenblad*) (1990) , 1475-1487; D.L. Peace, 'Major Maritime Events in the Persian Gulf between 1984 and 1991', 31 *VJIL* (1991), 545-566 at pp. 560-561.
[286] SC-Res. 787 (1992) reads:

> '12. acting under chapter VII and VIII of the Charter of the United Nations, calls upon States, acting nationally or through regional agencies of arrangements, to such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward shipping in order to inspect and verify their cargoes and destinations and to ensure implementation of the provisions of resolutions 713 (1991) and 757 (1992); …'

[287] D.A. Leurdijk, *The United Nations and NATO in Former Yugoslavia. Partners in International Cooperation* (The Hague, Netherlands Institute of International Relations 'Clingendael', 1996), 24-30.

Haiti[288] and Sierra Leone[289] the language adopted by the UNSC more or less followed the structure of SC-Res. 665.

5.3. Between implied and explicit

In three more recent situations, Lebanon (2006), Iran (2010) and Libya (2011), the UNSC did not use the above mentioned boilerplate phrase. The resolutions are arguably less explicit in the wording used to authorize maritime embargo operations. In the case of Iran, it may be argued that although the possibility of embargo operations is mentioned, it does not actually mandate anything at all.

5.3.1. Lebanon

After the Israeli-Hezbollah war in the summer of 2006, during which Israel also established a belligerent blockade off the coast of Lebanon, the UN established a maritime taskforce to help the Lebanese authorities to stop arms that were meant for Hezbollah. SC-Res. 1701 (2006) provides the mandate for the Maritime Task Force to UNIFIL (MTF UNIFIL) off the coast of Lebanon. Paragraph 15 imposes an arms embargo, but without any explicit enforcement authority for enforcement at sea. No explicit authorization was included that an UN-naval force was to set up a maritime arms embargo, using the boilerplate wording from SC-Res.665, or any other similar wording. The embargo operation and its authority must be read between the lines of paragraphs 11(f), 12, 14 and 15 of the resolution. Moreover, it establishes an arms embargo without mentioning that the

[288] SC-Res. 875 (1993) reads:

> '1. Calls upon Member States, acting nationally or through regional agencies or arrangements, cooperating with the legitimate Government of Haiti, to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to ensure strict implementation of the provisions of resolutions 841 (1993) and 873 (1993) relating to the supply of petroleum or petroleum products or arms and related matériel of all types, and in particular to halt inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations; …'

[289] SC. Res. 1132 (1997) para. 8 reads:

> 'Acting also under Chapter VIII of the Charter of the United Nations, authorizes ECOWAS, cooperating with the democratically-elected Government of Sierra Leone, to ensure strict implementation of the provisions of this resolution relating to the supply of petroleum and petroleum products, and arms and related matériel of all types, including, where necessary and in conformity with applicable internationalstandards, by halting inward maritime shipping in order to inspect and verify their cargoes and destinations, and calls upon all States to cooperate with ECOWAS in this regard; …'

measures taken are based on Article 41, and without stating expressly that the measures were taken under Chapter VII, although wording indicating a Chapter VII resolution is included.[290] The political background, however, made it clear that this paragraph was to be read as mounting an arms embargo operation in support of the Lebanese authorities which did not have the sufficient capacity to close their maritime border in order to prevent arms smuggling. Also, as this embargo operation is mounted under the command of the UN itself, by broadening the existing UNIFIL operation with a maritime dimension conducting an embargo operation, one cannot say that *another* organization authorized to act may have interpreted the resolution too broadly.

The actions taken in the territorial waters of Lebanon are subject to a request of the Lebanese authorities, which to some authors made it more a peacekeeping operation rather than a peace enforcing operation[291]. According to those authors the authorities on Lebanese territory were not derived from the resolution but from the Lebanese Government consenting to UNIFIL operating within its territorial waters. Even if this would be the proper way to construe UNIFIL's authorities within the territorial sea, the area of maritime operations of the UNIFIL MTF stretches outward to 43nm from the Lebanese coast and thus outside Lebanese territory. The question, therefore, remains on what authority UNIFIL visits vessels outside the territorial sea. In 2009, the commander MTF UNIFIL wrote that: 'If requested by the Lebanese Armed Forces-Navy (LAF-Navy), MTF may also board and inspect a suspect vessel'.[292] It is however unclear if this is the procedure for both inside and outside territorial waters and what legal ground the LAF would have to authorize visits outside territorial waters. The Netherlands government had a different approach and took the position that SC-Res. 1701 authorized 'all necessary action' (para.12), which would also include to board vessels suspected of breaching SC-Res. 1701.[293] This being the Netherlands view, interestingly, UNIFIL's website mentions that since the operation has started, it has hailed 42.500 vessels

[290] SC-Res. 1701 (2006) reads:
'Determining that the situation in Lebanon constitutes a threat to international peace and security'.
[291] J. Weingarter,'Das Unifil-mandat der Bundeswehr – politische und rechtliche Aspekte', in *Journal of international law of peace and armed conflict*, vol. 20. no. 2 (2007), 116-119.
[292] P. Sandalli,'Maritime task force's role in UNIFIL', in *Al Janoub*, no. 6 (January 2010), 6.
[293] Kamerbrief inzake beantwoording schriftelijke vragen over de maritime bijdrage aan UNIFIL (Letters to parliament answering written questions on the maritime support to UNIFIL), 11 October 2006.

and referred 1.670 to the Lebanese authorities for further inspection; no mention is made of any boardings that have taken place. Instead: 'All merchant vessels classified "suspect" are monitored and, if inbound to a Lebanese harbor, are referred for inspection to LAF authorities.'[294]

5.3.2. Iran

In a number of resolutions the UNSC has addressed the situation with regard to Iran and the non-proliferation of nuclear weapons. Interesting to note with regard to shipboarding is SC-res. 1929 (2010), which states:

> '15. *Notes* that States, consistent with international law, in particular the law of the sea, may request inspections of vessels on the high seas with the consent of the flag State, and *calls upon* all States to cooperate in such inspections if there is information that provides reasonable grounds to believe the vessel is carrying items the supply, sale, transfer, or export of which is prohibited by paragraphs 3, 4 or 7 of resolution 1737 (2006), paragraph 5 of resolution 1747 (2007), paragraph 8 of resolution 1803 (2008) or paragraphs 8 or 9 of this resolution, for the purpose of ensuring strict implementation of those provisions.'[295]

In this resolution the UNSC only 'notes' (as opposed to authorizes) the opportunity to embark on maritime interdiction operations on the high seas, but at the same time underlines the limits of the authorities only to what is allowed under general international law and the international law of the sea in particular. With this language, the Council, in this sensitive dossier, seems to have wanted to give States a certain justification *if* they would decide to start embargo operations against vessels that are suspected of carrying prohibited items, but at the same time made it clear that the resolution does not contain any additional authority. Besides the fact that the EU has taken this resolution to be the basis for subsequent implementation measures,[296] there has not been any international initiative to launch an actual maritime embargo operation. One can nevertheless imagine that this resolution will play an important role in *ad hoc* cases when intelli-

[294] http://unifil.unmissions.org/Default.aspx?tabid=1523. A practical reason to come to arrive at this operational decision could be that it may be easier to let the suspected vessel come into port where it is received to be fully inspected and where all the technical and legal facilities are present, rather than a potentially high risk visit and search at sea and having subsequent (legal) challenges of what to do with such persons and material.

[295] SC Res. 1929 (2011), para. 15.

[296] P.E. Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions against Iran', 17 *Journal of Conflicts & Security Law* (2012), 301-336.

gence suggests a breach of a resolution and States decide to act upon this. The resolution could, for instance, ease the path for acquiring the consent of the flag State as the resolution calls upon all States to cooperate with such a request.

5.3.3. Libya

The resolution on Libya is a case where it can easily be argued that it contains an explicit authority. In this case, however, the UNSC did not make use of the boilerplate phrases. Instead, Paragraph 13 of SC-Res 1973 (2011) took the approach of expanding the measures adopted earlier in UN-resolution 1970 to allow for the inspection of vessels on the high seas. The UNSC took the rather unique approach of replacing the paragraph in resolution 1970 with the following:

> '13. *Decides that* paragraph 11 of resolution 1970 (2011) shall be replaced by the following paragraph : "Calls upon all Member States, in particular States of the region, acting nationally or through regional organisations or arrangements, in order to ensure strict implementation of the arms embargo established by paragraphs 9 and 10 of resolution 1970 (2011), to inspect in their territory, including seaports and airports, and on the high seas, vessels and aircraft bound to or from the Libyan Arab Jamahiriya, if the State concerned has information that provides reasonable grounds to believe that the cargo contains items the supply, sale, transfer or export of which is prohibited by paragraphs 9 or 10 of resolution 1970 (2011) as modified by this resolution, including the provision of armed mercenary personnel, *calls upon* all flag States of such vessels and aircraft to cooperate with such inspections and authorises Member States to use all measures commensurate to the specific circumstances to carry out such inspections"; …'[297]

The mentioning of the high seas in this resolution are reason enough to consider the text to have explicitly authorized a maritime embargo operation, albeit not in the sense that it has used the standard phrases. The Libya-resolutions underline that the language that expresses or indicates maritime interdiction operations is now more diverse, the reasons for which may be manifold and driven by the particular circumstances of the conflict. Either the clarity of the language in the resolution may be subject to political aims and challenges which may require vagueness for the pur-

[297] SC-Res. 1973 (2011), para. 13.

pose of political progression, or it is chosen in such a way that it better applies to the actual conflict rather than the standard phrases. Indeed, it underlines that the wording of the resolution must be contextualized in the political situation to understand whether or not a maritime embargo operation is authorized or at best legitimized.

5.4. Legal basis for explicit maritime embargo operations: Article 41 or 42?

Even when the UNSC uses phrases that explicitly state a mandate to implement economic sanctions at sea, it does not, however, clarify the applicable legal basis under which the mandate is implemented. The core problem of determining between Article 41 and 42 with regard to explicit maritime embargo operations is that the aim is to impose Article 41 sanctions, but by using Article 42 means. The debate is not whether military means may be deployed under Article 41 or 42, but whether these forces can use coercive measures to implement economic sanctions.

The 41/42 debate has developed several lines of thought as to the legal basis for using military means to enforce economic measures at sea. One line centralizes its main arguments around a reluctance to place the naval enforcement of economic sanctions at sea wholly within Article 42. This line accepts that the enforcement of economic sanctions at sea with military means in principle falls outside the scope of Article 41, as it involves the use of armed force, but at the same time having reservations on placing it under 42. The arguments range from the intended scope and nature of Article 42, to the conditions under which Article 42 can be invoked and the level of force that is actually used during maritime embargo operations. Another line of thought is the view that the use of armed force in sanctions enforcement at sea could also be seen within the evolving scope of Article 41.[298] Military means and the use of force may be used to enforce economic measures when the purpose of the operation and the limited level of force used are such that it falls within the evolving parameters of Article 41. A last line of thought concludes that maritime embargo

[298] V. Gowland-Debbas, 25. Papastravidis also mentions that the UNSC has authorized maritime interdiction based on Art. 41, but offers no further explanation for this statement. E. Papastavridis, 'The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited', 24 *LJIL* (2011), 45-69 at 60.

operations plainly fall within the context of Article 42.[299] This line focuses on the use of force as the essential dividing line between Article 41 and 42. The following subsections will argue that in view of the evolved scope of Article 42 there may be less reluctance to position the military enforcement of economic sanctions at sea within the scope of Article 42 of the UN Charter.

5.4.1. The evolving scope of Article 42

Many of the arguments against Article 42 were put forward in the second half of the 1990s. Since then the applicability of Article 42 has evolved. Article 42 of the UN Charter reads:

> 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'

For the positioning of maritime embargo operations three particular points in this evolution can be highlighted. First, the scope of Article 42 operations has developed into a more and broader use of Article 42. Second, the evolution of Article 43 has crystalized. And third, the element of 'inadequate measures under article 41' has had more practice to determine how the UNSC deals with this phrase.

5.4.2. Large-scale military operations

The view that Article 42 was reserved for large-scale military enforcement operations, like those in Korea (1950) and Iraq (1991) that resemble traditional warfare, has been put forward as to why the naval enforcement of economic sanctions could not fit within Article 42. It was considered that maritime embargo operations are a completely different type of operation; small and limited in scale and purpose, with potentially a very low level of the use of force. Along the same lines, it has also been argued that the naval enforcement of economic sanctions could not be part of Article 42 because the article already has the option of authorizing a blockade, which

[299] E.g. H.B. Robertson (1991), 296.

must be distinct from the more limited maritime embargo operations.[300] As such, as Fielding mentions, in terms of scope, maritime embargo operations were more closely associated with Article 41 than Article 42.[301] In the cases of the former Yugoslavia and Haiti, Soons argues that: 'There was no situation of armed conflict between the enforcing States and the target State(s), and there was no alternative for article 41 as the basis for the resolutions, underlining the nature of article 42.'[302] Apparently Soons at that stage considered military operations only to be within Article 42 if they went beyond the threshold of an armed conflict.

The present-day application of Article 42 has however changed. First, the decisions of the UNSC have more frequently included the phrase 'all necessary means'. This is generally accepted as the authority given by the UNSC to implement the mandate with the use of force when necessary, and has been accepted to imply that the authorization is based on Article 42.[303] The scope of application of Article 42 has broadened to include more types of military operations beyond large-scale military operations, usually referred to as peace enforcement operations, which may not all escalate to a situation of armed conflict. The practice of peace enforcement operations has created a broader, but more moderate view of the use of armed force that can be used under Article 42. In cases where the UNSC has authorized the implementation of economic sanctions at sea, it has done so with the phrase 'to use measures commensurate to the circumstances as may be necessary'. This phrase is, strictly seen, not the same as 'all necessary means', but as McLaughlin notes, it is the equivalent of 'all necessary means' for sanctions enforcement at sea.[304] In the

[300] The use of the term 'blockade' in a non-legal manner is often referred to where maritime embargo operations are in fact meant. A blockade in a legal sense is all-encompassing and entirely seals off a coast or part of a coast without discrimination, whereas in maritime embargo operations usually vessels can still pass after inspection, provided that they are not breaching the UN-resolutions.
[301] Fielding (1993), 1241.
[302] Soons, 213.
[303] N. Blokker, 'The Security Council and the Use of Force – On Recent Practice', in N. Blokker and N. Schrijver, eds., *The Security Council and the Use of Force. Theory and Reality – A Need for a Change?* (Leiden, Martinus Nijhoff Publishers 2005) p. 22; R. McLaughlin, 'The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising "All Necessary Means"', 12 *Journal of Conflict and Security Law* (2007) pp. 389-417; T. Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester, Manchester University Press 2005), 43, fn. 70.
[304] McLaughlin (2007), 391.

case of Libya SC-Res. 1973 uses a combination between the two and states: 'to use all measures commensurate to the specific circumstances'.

Explicit maritime embargo operations also have the characteristics of peace enforcement operations: they are not designed to pose a classic military solution and can proactively use force beyond self-defence when vessels are not compliant. All vessels can be halted for inspection without any further requirement and no flag State consent is needed to board vessels.[305] Inspection and verification to ensure strict implantation of the resolution, implies such authority. The legal ratio of these powers is that the UNSC through Chapter VII of the UN-Charter can take coercive measures that all States, pursuant to Article 25 of the Charter need to comply with. What follows is that flag States cannot object to the boarding of their flagged vessels. Furthermore, it is argued that Article 103 of the UN-Charter trumps the exclusive jurisdiction of the flag State. Neither practice nor literature on the subject records any protests against this way of interpreting the resolutions. In the Yugoslavia-embargo the standard phrase was adopted in SC-Res. 787 (1992). Leurdijk mentions that this resolution was interpreted by NATO, in close coordination with the UN, as 'permitting the boarding and searching of all merchant traffic entering the Adriatic…'.[306] The commander of the Netherlands warship *Hr. Ms. Kortenaer*, who participated in the embargo in the Adriatic, wrote in line with Leurdijk's comments that boarding operations were only authorized after the adoption of SC 787.[307]

Secondly, apart from the broader scope of military operations conducted under Article 42, Blokker mentions an evolving tendency of defining the mandate in more detail, as opposed to the broad authorization of Iraq in UNSCR 678 (1990), to gain more control over the use of force, also arguably limiting the use of force.[308] It minimizes the possible political fear that too much force is unleashed in a particular situation. Interestingly, in this context, Weller comments with regard to SC-resolution 665 that Article 42 was specifically not included in the resolution to '[p]reclude an expansive interpretation of the authority that was grant-

[305] Soons, 214.
[306] D.A. Leurdijk, *The United Nations and NATO in Former-Yugoslavia, 1991-1996. Limits to diplomacy* (1996), 25.
[307] M.A. van Maanen,'Embargo operaties in de Adriatische zee', in *MRT* (1994), 15-18, at 15.
[308] Blokker, (2005), 24.

ed.'[309] Explicit maritime embargo operations to enforce economic sanctions at sea are precisely the kind of balanced and controlled actions towards which the UNSC has been moving. Maritime embargo operations are, in other words, a good example of how the powers of Article 42 can be used. In that sense, the wording of Article 42 which states: 'such action … as maybe necessary', may now be interpreted to include limited military operations using force to implement economic sanctions. Article 42 authorizes the ultimate and broadest authority in terms of the use of force, but does not preclude the lesser.[310] Maritime embargo operations may generally be considered as low scale operations in terms of the use of force. But how can one characterize a maritime embargo operation if it is an integral part of a military peace enforcement operation as a whole? This was the case in the NATO-led operation Unified Protector in Libya, generally viewed as an operation that was conducted under Article 42 that also rose up to the level of an armed conflict. The overall campaign, of which the embargo operation was part, was not a low-scale operation.

Additionally, apart from the arguments mentioned above, one other argument according to which maritime embargo operations could fit Article 42 is that nothing in Article 42 suggests that the measures taken on that basis cannot also involve economic measures that are enforced by military means. In fact, the use of a blockade, specifically mentioned in Article 42, is a method of naval warfare that traditionally falls under economic warfare. As Conforti noted, 'the forces mentioned in article 42 ought to be set up and employed not only for military action but in furtherance of measures under article 41'.[311]

5.4.3. Article 43 UN Charter

During the Iraq conflict, a case for the impossibility of Article 42 to be invoked was made as Article 43 of the UN Charter has remained dormant. No arrangements had yet been made for UN standing forces.[312] As the evolution of the working of the UN collective system on this point had not

[309] M. Weller, 'The United Nations and the Ius ad Bellum', in P. Rowe, ed., *The Gulf War 1990-1991 International and English Law* (London, Routledge 1993) pp. 29-54 at p. 36.
[310] See also Y. Dinstein, *War, Agression and Self-Defence* (Cambridge, Cambridge University Press 2003) p. 250.
[311] B. Conforti, 'Non-coercive Sanctions in the United Nations Charter: Some Lessons from the Gulf War', 2 *EJIL* (1991) 110-113, at 113.
[312] Schrijver, 153-154.

yet reached fruition in that period, this argument was then highly relevant.[313] At present, however, the argument has lost its strength. The practice of the UNSC has developed in a different way, authorizing the use of force through other agencies pursuant to Article 53 UN Charter. This practice has been accepted by the member states as a legitimate way for the UNSC to operate.[314] Member states are authorized to implement the decision of the Council taken on the basis of Article 42. Gazzini concludes on the connection between Article 42 and 43: 'Although supported in the past by the Secretary General, this view is now rather marginal.'[315] Therefore, Article 43 does not preclude explicit embargo operations that authorize the use of force from being characterized as Article 42-measures.

5.4.4. Inadequate measures under Article 41

For Article 42 to be invoked, the UNSC must consider that measures under Article 41 'would be inadequate or have proved to be inadequate'. The wording suggests that Article 41 can also be skipped from the outset if the view is that economic measures will not provide the desired result. The Council does not first have to (as one author seems to suggest)[316] impose sanctions, wait for them to fail, and then move to military enforcement. Schrijver has noted particularly in the case of UNSC resolution 665 (Iraq) that the resolution cannot be considered an Article 42 resolution because the UNSC did not determine that the measures taken in SC resolution 661 were inadequate.[317] However, the Council's practice appears to be that the UNSC only determines that the sanctioned State has failed to comply with the adopted obligations, but does not explicitly State that *therefore* those measures are inadequate before moving on to measures that involve the use of armed force.[318] Whether the condition of inadequacy is met must be

[313] Which was underlined by Cuba during the Iraq-Kuwait crisis. UN Doc. S/PV.2938, 25 August 1990, 13-17.
[314] N. Blokker, 'Is the Authorization Authorized? Powers and Practice of the Security Council Resolution to Authorize the Use of Force by "Coalitions of the Able and Willing"', 11 *EJIL* (2000), 541-568, at 554.
[315] Gazzini, 35.
[316] L. Rosensweig, 'United Nations Sanctions: Creating a More Effective Tool for the Enforcement of International Law', 48 *Austrian Journal of international law* (1995), 161-195, at 173.
[317] Schrijver, 154.
[318] In UNSC Res. 665, the preamble mentioned that: 'Iraq continues to refuse to comply with resolutions…'. UNSC Res. 678 was the basis for operation Desert Storm, in which states were authorized 'to use all necessary means to uphold and implement resolution 660 and all subsequent resolutions…'

derived from wording that does not express the condition in detail, like 'determining that the measures taken under such and such resolution have proven inadequate'. Interestingly, this approach also leaves open the opportunity for it to be repeated in subsequent resolutions without having to make the decision to move to military enforcement measures. Furthermore, if the UNSC decides from the outset of a conflict to use military enforcement measures, it is not likely that any mention or reasoning will be made with the view that measures under Article 41 would have been inadequate; this must be implied from the decision itself not to use economic measures.

5.5. Article 41 and the use of force

It is not debated that military means can be deployed in both Article 41 and 42, nor is it debated that no consent is needed to board a vessel. Rather, the question is whether naval forces can actually take coercive measures when vessel is not compliant. As mentioned above, the UNSC must use language that indicates that armed force can be used. The question arises as to whether Article 41 could imply such use of force. Four points can be made.

First, Article 41 does not preclude the use of force *in toto*. When the Council adopts economic measures based on Article 41 the target audience to implement these measures is the member states. They are obliged pursuant to Article 25 of the UN Charter to implement the decisions of the UNSC. Although the UNSC takes economic measures, such as prohibiting trade or imposing an asset freeze, which by their nature are measures that do not involve the use of armed force, member states are obligated to take, as Gazzini mentions: '[w]ithin their respective jurisdiction, all necessary measures to implement the economic enforcement measures'.[319] The possibility to use force or coercive measures for the implementation does not directly flow from the resolution, but is based on national legislation, for

Also in this resolution the preamble stated that Iraq refused to comply with its obligations despite all efforts by the UN. In UNSC Res. 787 (1992) the UNSC stated that it was deeply concerned about the continued violations of the embargo imposed by 713 (1991) and 724 (1991), and in the case of Haiti, the preamble of UNSC Res. 917 referred to UNSC Res. 783 (1993), in which the Council said that it was ready to take additional measures if Haiti continued to fail to comply in full with relevant resolutions. Finally, in the 2011 Libya crisis, the UNSC mentioned the failure to comply with Res. 1970 (2011) by the Libyan authorities.

[319] Gazzini,16.

instance in the pursuance of an arrest of persons who have breached the embargo, or to stop a vessel in territorial waters that is believed to be carrying prohibited items. Whereas domestic laws would provide a basis to enforce within the States' jurisdictional areas, it, however, will not be sufficient to also enforce an embargo outside the States' jurisdictional areas.

Second, at a minimum what is necessary to imply the authorization for the use of force at sea is that the resolution uses language that actually mandates the implementation of economic sanctions at sea. Without this there is nothing at all to imply the use of force. In other words, at least what is needed is a maritime embargo operation that is explicitly mandated. Although States may take the decision to send warships to sea, it is a step too far to also derive authority for the additional use of force where the UNSC has not even authorized economic sanctions to be enforced at sea. Klein, in the context of SC resolution 733 (Somalia), argues that implying the use of force in cases where the UNSC did not give explicit authorization 'seems unwarranted in view of the Security Council's practice at the time of explicitly authorizing that ships be halted and cargo inspected and verified under Chapter VII'.[320] This line also appears to have been followed in practice. During operation *Maritime Monitor* and *Sharp Vigilance* no enforcement powers were given to warships as they 'merely monitored merchant shipping entering into the Adriatic'.[321] With regard to the Beira Patrol, the UK took the view that boarding a vessel and arresting persons and cargo could only be done with the consent of the flag State. No authority was derived from SC-resolution 217.

Third, current practice does not provide any examples in which maritime embargo operations were expressly based on Article 41, authorized an explicit mandate for naval forces to implement sanctions at sea, *and* also authorized the use of force to implement these sanctions.[322] In the

[320] Klein (2011), 278.

[321] M. Pugh, 'Peacekeeping, Monitoring and Verification', in P.T. Haydon and A.L. Griffiths, eds., *Maritime Security and Conflict Resolution at Sea in the Post Cold War* (Halifax, NS, Centre of Foreign Policy Studies 1994) 207-224, at 208.

[322] The case of Southern Rhodesia has been confusing in the determination of whether the use of force was also possible under Art. 41. The Beira Patrol started as an implied maritime embargo operation based on SC Res. 217 (1965). The resolution only called upon, but did not decide under Chapter VII to impose sanctions. SC Res. 221 (1966), however, first reaffirmed in the preamble 'its call to all states to do their utmost to break off economic relations with Southern Rhodesia', and secondly, expressly authorized, with the use of force if necessary, the stopping of the Greek-flagged tanker *Joanna V*. The resolution clearly indicates that the *former* resolutions were taken with Art. 41 in mind, but not however SC Res. 221 itself that included the use of force against Joanna V. Uniquely, the UNSC first authorized force to stop the oil and petroleum flows, and then posed in SC Res. 232 (1966) for the

case of Sierra Leone and Iran it is clear that sanctions are taken under Article 41. In the first case, the UNSC also authorized maritime embargo operations, but it states that the implementation must be done in cooperation with the government of Sierra Leone and 'in conformity with applicable international standards'.[323] The UNSC did not use the 'necessary measures' phrase that indicates that force can be used. In the case of Iran, Article 41 is explicitly mentioned and also has the slightest indication of possible implementation through maritime embargo operations in SC-resolution 1929 with regard to Iran.[324] This resolution at the same time underlines that there are no additional enforcement powers based on the resolution itself. In relation to the sanctions imposed against Iran, Gray makes an important point which underlines the importance of the division of Article 41 and 42. She mentions that the UNSC carefully specified that the sanctions against Iran are based on Article 41, 'in order to ensure that no claim could be made that the Security Council was implicitly authorizing the use of force'.[325] Although she does not say whether force can be used under Article 41, she does point out the danger of blurring the dividing lines between 41 and 42.

Fourth, when explicit authority for a maritime embargo operation is given *and* the language also indicates the authority to use force, the actual level of force used has been an argument to place authority for enforcement still under Article 41. Politakis has argued that actions taken in practice – rare instances of using warning shots across the bow[326] – 'have very little to do with what one would understand as use of force'.[327] This discourse could lead to the conclusion that very low-scale use of force should be implied in the enforcement of economic sanctions under Article 41.

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first time in the Council's existence mandatory sanctions specifically based on article 41, whilst also reaffirming resolution 221. Since the adoption of SC Res. 232 it may seem as if force was authorized under a specific Art. 41 mandate. In fact, SC Res. 232 adopted a wide range of economic sanctions under article 41 without the use of force. Next to that, only the oil embargo could be enforced with the use of force if needed, which, as said, was based on a resolution that did not mention any article.

[323] SC Res. 1132 (1997), para 8.

[324] SC Res. 1929 (2010) states that: 'Acting under Article 41 of Chapter VII of the Charter of the United Nations…'

[325] C. Gray, *International Law and the Use of Force* (Oxford, Oxford University Press 2008), 266.

[326] Morabito mentions that a warning shot was used during the Iraq conflict on 18 August (before SC Res. 665 was adopted). More interestingly, he considers a warning shot to be '[a]n accepted international signal by which a warship tells a merchant vessel to stop'. Morabito, 307. On warning shots, see also McLaughlin, who, although his phrasing is somewhat confusing as he refers to SC Res. 665, appears to opine that warning shots are a use of force that is not force in the sense of Article 42 of the Charter.

[327] Politakis (1994), 192.

Apart from the view by some that, for example, warning shots are a traditional and inherent authority for warships, it may not be completely accurate to draw conclusions solely on the view of what force *has been* used during maritime embargo operations. If one wants to derive conclusions from practice in terms of the use of force, more important would be the question of what force *can* be used to compel compliance in circumstances that require a step up in coercive measures. Even though the practice may have been that maritime embargo operations are usually of a very low scale on the use of force ladder, this may only mean that commanders of warships have not been confronted with situations in which more force was needed to compel the vessel to comply with the orders of an interdicting warship. The rules of engagement (ROE) may in fact provide for a more robust use of force. The question should, therefore, be raised, for example, whether the crew have ROE that contain the ability to escalate the use of force when necessary and may use disabling fire, detain persons, or use force to protect themselves against hostile acts or the intention to engage in such acts by the vessel's crew or passengers. When a commander of a warship has been given these types of coercive measures, it may be less logical to argue that the use of force is in fact so limited that it can be neglected and therefore positioned within Article 41. At the same time, one must however also keep in mind that coercive action in maritime embargo operations are actions against civilians who, even when they resist, do not take part in hostilities. As such, it limits the overall scope of military measures that can be taken under these circumstances.

5.6. Sub-conclusion maritime embargo operations

Imposing economic measures against a State is not an unfamiliar task for navies. On the contrary, economic warfare has always been part of the operational oeuvre and the conditions under which the economy of the adversary can be targeted are for instance well presented in the law of naval warfare. Maritime embargo operations executed within the context of the collective security system have been another, and nowadays well established, step in the evolution of economic warfare at sea. In the past, authors have suggested that there is no strict separation between Article 41 and 42 of the UN-Charter when it comes to enforcing economic sanctions at sea. The different views in this debate have led to conclusions that

maritime embargo operations are based on '41½ resolutions'[328] or were found to be venturing in uncharted waters halfway between economic sanctions and military enforcement.[329] To envisage the relationship between Article 41 and 42 as a continuum would in the first instance indeed be a suitable view for the positioning of the naval enforcement of economic sanctions at sea. The heart of the UNSC decision to authorize naval assets to implement economic sanctions at sea clearly lies with Article 41, but the justification and authority to act with military means to enforce implemented economic measures seems more closely related to Article 42.

In determining whether or not maritime embargo operations fall under Article 41 or 42 of the UN Charter, this Chapter first tried to make clear that maritime embargo operations are not one of a kind and can largely be divided into implied and explicit maritime embargo operations. The latter can furthermore be divided into operations that are and are not authorized to use force. Consequently, the question as to whether or not maritime embargo operations fit Article 41 or 42 cannot therefore be answered in general, but must be reassessed per situation on every occasion. Secondly, the practice of maritime embargo operations shows that in cases in which the UNSC specifically adopted sanctions under Article 41, and maritime embargo operations were authorized or brought up as a possibility, the use of force was not authorized in the same resolution. In cases in which explicit maritime embargo operations were authorized, including the use of force to enforce the economic sanctions at sea, Article 41 is never explicitly mentioned. Whether Article 41 includes the use of force to implement economic sanctions at sea cannot be sufficiently answered through the current practice of maritime embargo operations because there has not been any situation in which the UNSC has specifically adopted an Article 41 resolution and also explicitly mandated a maritime embargo operation that was authorized to use force. The resolutions on Sierra Leone and Iran do however suggest that the UNSC is very reluctant to use wording that indicates the use of force to implement economic sanctions under Article 41. It is therefore tempting to conclude that only when a maritime embargo operation is based on all three conditions of the existence of economic sanctions, an explicit authority to implement at sea and

[328] Blokker, 544.
[329] Politakis (1994), 197.

an authorization to use coercive measures can a maritime embargo operation fall under Article 42. In all other cases of explicit embargo operations it falls back on Article 41. In cases of implied maritime embargo operations the legal basis falls outside the scope of Chapter VII. This conclusion may be even more tempting within the context, as these paragraphs have argued, of the view that presently there are arguments which would take away the initial reluctance to base the use of force in maritime embargo operation under Article 42. Over past years Article 42 has evolved in such a way that it allows for a broader and more moderate scope of military operations within the context of Article 42, particularly military operations that are more limited in scope and the use of force. Furthermore, other restraints in the original set-up of the UN Charter, such as Article 43 and the condition of inadequate measures, no longer form an obstacle to positioning the military enforcement of economic sanctions in Article 42. With the experience we now have, explicit maritime embargo operations that fulfill the three mentioned conditions may well be positioned within Article 42 of the UN Charter.

5.7.UN-mandated interception operations under 'all necessary means'

The above section has analysed the legal basis for maritime embargo operations to implement economic measures adopted by the UNSC. Besides economic measures the UNSC can also decide to take other measures that can be enforced by naval assets based on Chapter VII of the UN-Charter. These measures can either be specific measures against specific threats, such as piracy, or to use a specific method, such as the method of blockade, but can also be more general to authorize the use of armed force to fulfil a mandate. In such cases the UNSC can *authorize all necessary means* to fulfill the mandate, which translated in operational conduct may lead to the need of conducting MIO.

5.7.1. 'All necessary means'

When the UNSC adopts a resolution within a Chapter VII-context that authorizes the use of *all necessary means*[330], it is generally accepted as

[330] Interestingly, in UN-resolution 2249(2015), regarding the Council's reaction to the terrorist attacks in Paris in November 2015, the UNSC used the *all necessary means*-phrase, but did not pre-worded it

giving authority for the use of military force based on Article 42 of the UN-Charter.[331] The phrase *all necessary means* is translated on an operational level into authorities for the military, such as the rules of engagement (ROE). Based on the circumstances of the conflict conducting maritime interception operations may be one of the means necessary and will therefore be granted through the specific mission ROE. Clearly, the phrase does not provide any specific methods, but rather very broadly sets the outer limits within which the military operations need to operate to fulfill its mandate. How far *all necessary means* to enforce a mandate can go, is highly contextual. One author has suggested this possibility within the context of maritime operations in East Timor.[332] Rogers, writes that in the East Timor case "all necessary means in SC-Res. 1264 (1999); "was arguably broad enough to encompass a right of approach and visit if required".[333]. Klein also states that *all necessary means*: '[m]ay be considered as sufficient authority for interdictions at sea to enforce the Security Council's sanctions regime'.[334] Such a view has also been part of discussion during operation *Unified Protector* (OUP) with regard to Libya in 2011. The military operations with regard to Libya between March and November 2011 consisted also of a significant maritime element in which both a maritime arms embargo was enforced and naval forces were deployed to contribute to the protection of civilians based on UNSC-res. 1973 (2011). Paragraph 4 of UNSC Res. 1973 (2011) reads:

> 4. Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated

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with the term "authorize". Instead, it "called upon"states, rather than it authorized states to use all necessary means. It led to discussion whether or not the resolution actually gave powers to use military force based on resolution 2249.

[331] R. McLaughlin (2007); E. Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis', in *ICLQ* vol. 83 (2007), 83-118. Papastavrides notes that:

> The example par excellence of that could not be other than the ritual incantation of the magic formula "to use all necessary means" from Resolution 678 (1990) onwards in every case of authorization to use force. The above phrase was accepted to have a different meaning than the ordinary and to denote the authority to use force, illustrating thus the common will of the Council to that effect. The existence of this formula in a Resolution is perhaps the most decisive factor as to whether the latter has authorized the use of force.

[332] F. Rogers, 'The international force in East Timor – legal aspects of maritime operations', in *UNSW Law Journal*, vol. 28, no. 2 (2005), 566-580, at 579.

[333] Rogers, 579.

[334] Klein (2010), 279.

> areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council;

Because of the manner in way the text of resolution 1973 was construed, the arms embargo was limited to be enforced only outside the Libyan territorial waters. Paragraph 4 was, however, not limited in such a way. If necessary for the fulfilment of the mandate of protecting civilians, all necessary means could have been operationally translated into stopping and boarding vessel in the territorial sea. What matters in this is that the action taken must be in concordance with the purpose of the mandate. If, for instance, the general practice of the UNSC is to explicitly authorize oil embargo's against a State, discussion can emerge on whether an operation that practically result in an oil embargo and based on 'all necessary means' really is in line with the purpose of the mandate. Although such matters are at dependent upon the actual situation in a given conflict, it is submitted here that 'all necessary means' may include the use of naval forces to conduct MIO to enforce the mandate, if this is in fact in line with the purpose of the mandate.

5.8. Specific measures

Apart from the general *all necessary means*-phrase, the UNSC can also adopt specific measures in which the Council authorizes interception operations for a specific aim and purpose, or through a specific method. Specific measures can be taken with regard to a wide range of subjects, such as piracy, or WMD's, but the Council can also decide to establish a naval blockade or take a specific measure to help support a State that is trying to stabilize internal unrest. These four will be briefly touched upon in the next paragraphs.

5.8.1. "Article 42"- blockade[335]

A type of maritime interception operations, albeit under a more traditional name, is explicitly mentioned in Article 42 of the UN-Charter. Article 42 mentions as an example of measures that can be taken under Article 42, the use of a blockade to enforce measures taken by the UNSC. By nature, a blockade is different than an embargo operation. Whereas the embargo is a control-mechanism to inspect inward and outward shipping where vessels may pass if it does not carry any of the prohibited items, a blockade closes the target port or coastal stretch completely and lets no one and nothing in in or out, save a few specific exceptions.[336] In that sense, MEO are closer to contraband law than blockade law as they establish a selective barrier rather than a complete one. A blockade is impartial and not focused on certain goods or persons, but simply closes the sea routes to and from the targeted State completely.

A difference must be made between the UNSC specifically authorizing a blockade under Article 42 UN-Charter and the decision of military commanders to establish a blockade when the factual situation of the conflict and the given mandate allows them to resort to such a method. The first authorizes, as a legal basis, a *de facto* blockade operation under the authorities that will be determined in the resolution. The second is a method of the law naval warfare, which can be applied when the factual circumstances of the conflict rise to an international armed conflict, and allows for the law of naval warfare to be applied. A third option would be that an *all necessary means*-mandate is neither explicitly stating to use a blockade, nor does the conflict rise to an international armed conflict. A *de facto* blockade could in this case still be argued, but within limited purpose of the mandate.

At this stage, no resolution has ever been adopted by the UNSC in which it explicitly called for a blockade. Decisions by military commanders to resort to blockade operations under the law of naval warfare have, however, taken place. During the Korea War the method of blockade was used by the naval force, shortly after the North Korean invasion of South Korea in July 1950, which was made possible by SC-Resolutions 83 and

[335] See also Chapter 9, paragraph 9.5.3. with regard to the question whether the law of blockade applies to an "Article 42"-blockade.

[336] See on these exceptions M.D. Fink, 'Contemporary views on the lawfulness of naval blockades', in *Aegean Review of the Law of the Sea and Maritime Law*; vol. 1, no. 2 (2011), 191-215.

84 (1950).[337] Taskforce 95 was called the *UN Blockading and Escort Force* (UNBEF). In this case, the UNSC declared that members of the UN may furnish such assistance that may be necessary to repel the attack of North Korea. The military operations resulting from this UNSC-authorization can be characterized as an international armed conflict, to which the law of war, including the law of naval warfare, applied. The operations came under unified command of the US, led by General Mac-Arthur. US President Truman then ordered a naval blockade against North Korea.[338]

During the Iraq crisis in 1990, the media quickly moved to the use of the term blockade after the adoption of UNSC-res. 665.[339] Although the US and UK, still operating under the legal basis of article 51 UN-Charter, could have established a blockade, they did not. The measures taken by the Council could be seen as complementary measures to self-defence. The authorities given by Council, however, did not authorize a blockade and did not go beyond maritime embargo operations. At that stage of the conflict, a possible blockade would not have been connected to the measures taken by the Council. From the adoption of the 'ultimatum-resolution' SC-Res. 678 that led to *Operation Desert Storm* in January 1991, arguably, either these UNSC-measures can be seen as part of necessary measures within the context of self-defence, or as the Council taking measures within the collective security system.[340] Either way, the subsequent military operations rose to an international armed conflict, to which the law of naval warfare applied. Although not actually executed, one example of the third option can be mentioned here. During the Cyprus crisis in 1974, when Turkey decided to invade the island, a British Task Force set off to sail to Cyprus. The commander of these British forces in Cyprus suggested blockading the northern coast of Cyprus to stop the Turkish reinforcements on Cyprus on behalf of the UN. A UN-peacekeeping force (UNFICYIP[341]) had been established on Cyprus since 1964. Although the UK naval Task Group went to position itself at sea, the initiative was

[337] Baer (1993), 323.
[338] Politakis (1997), 64-66.
[339] See e.g. 'Comprehensive mandatory sanctions imposed against Iraq - Kuwait: The Crisis - Cover Story', in U.N. Chronicle, December 1990; J.E. Marolda and R.J. Schneller Jr., *Shield and Sword. The United States navy in the Persian Gulf War* (2001), 83-96.
[340] See discussion on this point for instance in T.D. Gill, 'When does self-defence end?', in M. Weller (ed.), *The Oxford Handbook of the use of force in international law* (2015), 737-751; Y. Dinstein, *War, aggression and self-defence* (2001), at 242-245.
[341] *United Nations Peacekeeping Force in Cyprus* (UNFICYP).

called off, amongst other reasons, because it was questionable whether UNFICYIP mandate would support such an action, when performed as an official declared part of UNFICYIP.[342]

5.8.1. Piracy

The UNSC adopted several UN-resolutions concerning the fight against piracy off the coast of Somalia.[343] Although piracy has been a longstanding issue in these and also other parts of the world, these resolutions brought the issue of piracy off the coast of Somalia onto the international peace and security agenda. Through its resolutions the UNSC has mainly served as a vehicle for international action with regard to piracy in the seas around the Horn of Africa. It has furthermore helped to enable to take measures against piracy within the Somali territorial sea and also even on land. The counter-piracy resolutions are adopted under Chapter VII of the UN-Charter and also include an *all necessary means*-mandate. SC-Res. 1816 (2008) mentions that States cooperating with the Somali Transitional Federal Government in the fight against piracy may:

> (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;[344]

A number of important limitations have, however, been brought into the resolutions. First, and as eluded to in the chapter on consent, to operate in the Somali territorial sea the Chapter VII authorities are restricted by the consent of the Somali authorities. Second, the authorities of the participating States must be consistent with action permitted on the high seas, which means that actions must be concordance with the law of the sea. Additionally, in terms of legal regime, the use of force is limited to force that is allowed within the context of human rights law standards.

[342] J. Asmussen, *Diplomacy and conflict during the 1974 crisis. Cyprus at war* (2008), 133-134.
[343] SC Resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1844 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011), 2015 (2011), 2020 (2011), 2077 (2012) and 2125 (2013) 2184 (2014).
[344] SC-Res. 1816 (2008), para 7(b).

5.8.3. Weapons of mass destruction and terrorism

The prohibitions regarding weapons of mass destruction, commonly regarded as chemical, biological, nuclear and radiological weapons, are regulated by treaties such as the BWC,[345] CWC[346] and the NPT.[347] In 2004, the UNSC adopted SC-Resolution 1540 with regard to non-proliferation of WMD, in which it decided that; 'all States shall refrain from supporting by any means non-State actors that attempt to acquire, use or transfer nuclear, chemical or biological weapons and their delivery systems'.[348] Although it has been adopted under Chapter VII of the UN-Charter, this resolution does not authorize any maritime enforcement actions on the high seas.[349] For its enforcement it primarily relies on other treaties, all of which do not contain provision that allow non-consensual interception on the high seas of foreign flagged vessels by warships when the provisions of the treaties are breached. Just after the 9/11 attacks, the UNSC adopted SC-Res 1373(2001), determining that terrorists acts are a threat to international peace and security. Also this resolution does not contain a specific authority for enforcement of the adopted measures on the high seas.

The UNSC has the possibility to adopt military measures to enforce that States will comply with their WMD non-proliferation and disarmament obligations when it considers that breaching them is a threat to international peace and security. Apart from the non-proliferation resolution 1540, the UNSC has adopted a number of other resolutions with regard to specific States, such as North Korea[350] and Iran.[351] In these specific cases thus far, and although measures are taken under Chapter VII, the UNSC has not authorized any coercive enforcement measures *at sea* that would include the boarding of a foreign flagged vessel to stop WMD.[352] In fact, with regard to Iran under SC-res. 1747 (2007)[353] and 1929 (2010)[354] the

[345] *The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 10 April 1972.
[346] *Chemical Weapons Convention*, 3 September 1992.
[347] *The Treaty on the Non-Proliferation of Nuclear Weapons*, 1968.
[348] Press release SC/8076. UN Security Council, 4956th Meeting (PM), 28 April 2004.
[349] See e.g. C. Dafrancia, 'Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures', in *Vanderbilt journal of transnational law*, vol. 45:705 (2012), 705-783.
[350] SC-Res. 1695 (2006) and 1718 (2006).
[351] SC-Res. 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1887 (2009) and 1929 (2010).
[352] See on North Korea, E. Yong-Joong Lee, 'Legal Analysis of the 2006 U.N. Security Council Resolutions Against North Korea's WMD Development', in *Fordham International Law Journal* Vol. 31, no. 1 (2007), 1-33.
[353] Operative paragraph 5 of SC-Res. 1747 (2007) reads:

UNSC specifically adopted the wording that states that inspection measures on the high seas could only be taken based the consent of the flag States. As a last, in the context of acting against WMD, the failure of Iraq to comply with SC-Resolutions 678, 687 and 1441 was interpreted by the US and UK to invade Iraq and to overthrow Saddam Hussein in the Gulf War of 2003. The military operations also had a naval dimension which included MIO.[355] The justification for the start of military operations against Iraq based on these resolutions, however, has been very widely criticized.[356]

5.8.4. Crude oil export: Libya 2014

The Libya-conflict of 2011 resulting in the overthrow and death of Qaddafi did not result in a further peaceful rebuilding of Libya. Internal struggles between striving local militias demanding autonomy and the government continued to be a challenge for the State. Local militias have kept their weapons and have taken control of some of the oil ports in parts of Libya.[357] This situation led to the adoption of SC-Res. 2146 (2014) that authorizes under Chapter VII the stopping, albeit with consent, of designated vessels that illicitly transported crude oil from rebel held ports. Days before the adoption of this resolution, US Navy SEALS stopped the tanker

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> Decides that Iran shall not supply, sell or transfer directly or indirectly from its territory or by its nationals or using its flag vessels or aircraft any arms or related materiel, and that all States shall prohibit the procurement of such items from Iran by their nationals, or using their flag vessels or aircraft, and whether or not originating in the territory of Iran;

[354] SC-Res. 1929 (2010), paragraph 15 reads:

> 15. Notes that States, consistent with international law, in particular the law of the sea, may request inspections of vessels on the high seas with the consent of the flag State, and calls upon all States to cooperate in such inspections if there is information that provides reasonable grounds to believe the vessel is carrying items the supply, sale, transfer, or export of which is prohibited by paragraphs 3, 4 or 7 of resolution 1737 (2006), paragraph 5 of resolution 1747 (2007), paragraph 8 of resolution 1803 (2008) or paragraphs 8 or 9 of this resolution, for the purpose of ensuring strict implementation of those provisions;

[355] J. Kidd, 'Campaign analysis: Maritime forces', in P. Cornish (ed.), *The conflict in Iraq, 2003* (2004), 134-144.

[356] The US and participating states opined that the authority to use force derived from the earlier resolutions in the beginning of the 1990's could in 2003 still be used to use force after the failure of Iraq to comply with SC-Res. 1441. (see e.g. N. Rostow, 'International Law and the 2003 Campaign against Iraq', in *ILS*, vol. 80 (2006), 21-42.) Other states disagreed on this point of view and opined that a further resolution from the Council was needed to resort to the use of military force. See e.g. T.M. Franck, 'Iraq and the law of armed conflict', in *ILS*, vol. 80 (2006), 15-20; T. Gazzini, *The changing rules on the use of force in international law* (2005), 227-230.

[357] 'Libya asks UN and the world for help', in *Times of Malta*, 20 March 2014, p. 12.

Morning Glory that was trying to leave Libya to sell oil.[358] The UNSC-actions are a very specific action in a particular phase of state building and appears to be an attempt to canalize Libyan political developments for the better.

5.9. Conclusions

The UN-collective security system provides a legal basis for maritime interception operations. Two types of MIO can be distinguished in this category. The first are the maritime interception operations that aim to enforce economic measures taken by the UNSC under Article 41 UN-Charter. These operations are called usually maritime embargo operations, which aim at enforcing economic sanctions at sea. The second are interception operations, based on Chapter VII, that do not specifically aim to enforce economic measures. This category can either authorize the use of armed force to fulfill a mandate through general indications such as all necessary means, which may include MIO, depending on the circumstances of the conflict, or can explicitly authorize MIO in relation to a specific subject, such as piracy or WMD. States can also mount maritime interception operations outside the Chapter VII-scope, but this will impact on the authorities that warships may have to support the UN efforts. Arguably, then, it must be questioned whether the UN-collective security systems is actually providing the legal basis, or that States make use of the freedom of the seas to support UN-efforts towards controlling a conflict. The bottom line is that it very much depends on the circumstances of the case and the manner in which way the UNSC chooses to deal with the issue.

Maritime embargo operations based on the UN-collective security system are, as noted in Chapter 3, the type of MIO that was first meant by the term MIO itself and have since their inception been uded by the UNSC as an instrument to restore international peace and security. The legal parameters of this legal basis have now for the most been crystallized. Next to standard phraseology to indicate that embargo operations are authorized, even in the event that those phrases are not used, such as in the case of

[358] US Department of Defense, press release, 17 March 2014, NR-126-14, 'DoD Statement on Boarding of Commercial Tanker Morning Glory'.

Libya and Lebanon, it has led to a standard maritime embargo operation, albeit matched to the details of the text of the resolution and other specific circumstances of the conflict.

CHAPTER 6

Self-defence and maritime interception

As a practical guideline naval planning staffs should take it for granted that the employment of force…will be regarded as overstepping the boundaries of the legitimate, except when resorted to in self-defence. The real problem is what is meant by self-defence against an armed attack?

-D.P. O'Connell, The Influence of Law on Seapower[359]

6. Introduction

Self-defence as a legal basis for military operations has since the 9/11 attack been under much scrutiny with regard to how self-defence should be applied against contemporary threats. In the maritime dimension self-defence is often argued in two different contexts. It is firstly argued as the legal basis for the deployment of large scale military campaigns with a naval component. Recent examples of this context are maritime interception operations conducted in *Enduring Freedom*, *Active Endeavour*, *Cast Lead* and *Change Direction.* It is secondly argued as a basis to stop weapons of mass destruction and terrorists or a combination thereof at sea, outside the context of large scale naval operations.[360] The latter approach applies the right of self-defence against single threats in individual cases.

[359] O'Connell, 54.

[360] D. Guilfoyle, 'The proliferation Security initiative: interdicting vessels in international waters to prevent the spread of weapons of mass destruction? ' in *Melbourne University Law Review*, vol. 29 (2005), 734-764, at 750; M.A. Fitzgerald, 'Seizing weapons of mass destruction from foreign flagged ships on the high seas under article 51 of the UN-Charter', in *VJIL*, vol. 49, issue 2 (2008), 473-506; M.R. Shulman, The proliferation security initiative and the evolution of the law on the use of force', in *Houston Journal of International law*, vol. 28, no. 3 (2006), 771-828; J.M. van Dyke,'The Disappearing right to navigational freedom in the exclusive economic zone', in *Marine Policy*, vol. 29 (2005), 107-121; W. Heintschel von Heinegg,'Current legal issues in maritime operations: Maritime interception operations in the global war on terrorism, exclusion zones, hospital ships and maritime neutrality', *in IYIL*, vol. 34 (2004), 151-178;. Klein also sort of points in this direction of this as an emerging trend, Klein (2011), 297-300 and Klein (2005), at 307-308.

This approach to the use of self-defence as a legal basis has particularly emerged since the fight against terrorists was broadened against persons and cargo beyond Al Qaida, the Taliban and its affiliates. It was primarily initiated by the US National Security Strategy (2002), in which the former US president George W. Bush coined the much debated idea of pre-emptively countering threats to US national security, in particular terrorists who obtain and use weapons of mass destruction. Interestingly, back in 1956, the International Law Commission noted on the issue of whether the right of self-defence could be another exception to the exclusive jurisdiction of the flag State that it was not 'deemed to be advisable', because of the vagueness of terms as 'imminent danger' and 'hostile acts', which leaves them open to abuse.[361] To some, the issue implied the recognition of the idea itself.[362] To others, the ILC-commentary closed the subject as not being possible.[363] Today, however, the discussion of self-defence in relation to the exclusive jurisdiction over a vessel has received new attention in the legal arena. This Chapter will analyse the right of self-defence in relation to MIO. It will firstly start with a brief introduction to self-defence and then study the application of self-defence through both large scale naval operations that include maritime forces with an interception role, and self-defence MIO in response to single threats of WMD and terrorists.

6.1. The right of self-defence

Similar to the UN-collective security system the legal basis of self-defence takes as the starting point the prohibition on the use of force laid down in Article 2(4) of the UN-Charter. The sources of the right of self-defence are usually considered to be based on both the UN-Charter and international customary law. As such, there are specifically written condi-

[361] UN Doc A/3159, Comment 4 to article 46. *YILC* 1956 II, 284. Comment 4 is worthwhile quoting here because it remains of relevance to this day. It reads:

> The question arose whether the right to board a vessel should be recognized also in the event of a ship being suspected of committing acts hostile to the state to which the warship belongs, at a time of imminent danger to the security of that state. The commission did not deem it advisable to include such a provision mainly because of the vagueness of terms like 'imminent danger' and 'hostile acts', which leaves them open to abuse.

[362] A.M. Syrigos, 'Development on the interdiction of vessels on the high seas', in A. Strati, M. Gavouneli, N. Skourtos (eds.), *Unresolved issues and new challenges to the law of the sea. Time before and time after. Publication on Ocean Development*, vol. 54 (2006), 149-202, at 163.

[363] E. Somers, *Inleiding tot het internationaal zeerecht* (5th ed. Kluwer, 2010), 291.

tion for self-defence in Article 51 of the UN-Charter[364] and additional conditions that are derived from customary international law. In short, the conditions to be fulfilled in order to invoke the right of self-defence are firstly the existence of an armed attack. Secondly, the reaction to the armed attack must fulfill the substantive[365] customary conditions of necessity, proportionality, and immediacy. Necessity relates to the existence of an armed attack or an immediate threat of attack and focuses on the question whether the use of force under self-defence is a measure of last resort to which there are no other means or alternative available than the use of force. Proportionality focuses on the issue of a balanced response to the armed attack, against the background of the aim of self-defence, which is first to halt and repel the attack, and, to some authors, also includes ensuring that the attacker cannot mount future attacks.[366] Immediacy considers the temporal link between the attack and the start of the reaction to the attack, once the attack has occurred.

The answer to the question whether an armed attack has occurred, has been part of extensive legal debate since the 9/11 attacks, in particular from a material, temporal and *personae* approach. These three approaches deal with the questions of what amounts to an armed attack, at what moment in time can the right of self-defence be invoked and against whom it can be invoked. The debates have, therefore, concentrated on issues whether self-defence could exist in an anticipatory manner, whether it can be invoked against non-state actors and which scale and effect the attack must have be to be considered an armed attack. This is not the place to repeat these debates, but it generally appears that, although the jurisprudence of the ICJ is more reluctant,[367] scholars are moving into the direc-

[364] Article 51 of the UN-Charter reads as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[365] Next to these conditions, there are also procedural conditions that oblige to inform the UNSC that use of force is used in the context of self-defence. This procedural obligation is explicitly stated in article 51 UN-Charter.

[366] D. Kretzmer,'The inherent right to self-defence and proportionality in ius ad bellum', in *EJIL* vol. 24 (2013), 235-282, 264; Gill (2007), 124.

[367] E.g. Dinstein (2005); M.N. Schmitt,'"Change Direction" 2006: Israeli operations in Lebanon and the International law of self-defense', in *Michigan Journal of International Law*. Vol. 29, no. 2

tion that the general answer to the first two questions relating to the expanding scope of self-defence might well be a positive one.[368] Indeed an evolution has appeared to have taken place with regard to the scope of armed attack, which now also is considered to include both anticipatory attacks and attacks mounted by non-state actors. As Van Steenberghe has concluded based on a study of recent state practice; '...the interpretation of recent state practice amounts to considering that the latter evidences a clear tendency towards allowing States to act in self-defence in response to attacks, even if these attacks are committed only by non-state actors'.[369]

Within the context of maritime interception operations, the issue of *ratio personae* opens the possibility to act against non-state actors that are on board a vessel or use the vessels for the armed attack. The material aspect of self-defence emerges as an issue in the context of attacks against warships and what possibilities to react a State and the individual warship commander might have.[370] But more importantly, the broadened scope of self-defence in the temporal aspect is particularly of interest for proponents of the view that foreign flagged vessels that pose an imminent threat by virtue of their threatening cargo can be boarded based on self-defence. In this context anticipatory self-defence, which is seen through the now generally accepted *Caroline-criteria* -the armed attack must be instant, overwhelming, leaving no choice for other means, and no moment for de-

(2008), 127-164. He underlines that there is a difference in view between jurisprudence of the International Court of Justice and state practice in the case of operation Change Direction.

[368] See e.g. D. Kretzmer, 'The inherent right of self-defense and proportionality in Ius ad Bellum', in *EJIL*, vol. 24 no. 1 (2013), 235-282; M.C. Waxman,'Regulating resort to force: form and substance of the UN charter regime', in *EJIL*, vol. 24. No. 1 (2013), 151-189.

[369] R. van Steenberghe, 'Self-defence in response to attacks by non-state actors in the light of recent state practice: A step forward?', in *LJIL*, vol. 23 (2010), 183-208, 207.

[370] In the *Oil Platform* case, the ICJ noted that although in the specific circumstances of the incident with the *USS Samuel B. Roberts* being struck by a mine the it considered that attacking the platforms was not justifiable in response to an armed attack, the Court did state it does not exclude the possibility that; 'the mining of a single military vessel be sufficient to bring into play the "inherent right of self-defense". Judge Simma's separate opinion adds to this that although force may not be justifiable under Article 51 of the UN-Charter, where the threshold of gravity is not met, a state may still take proportionate defensive measures. ICJ, *Oil Platform* (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, 161 (Oil Platforms case). In the *Oil Platforms* case the ICJ dealt with the case of the US attacking a number of Iranian oil platforms. The attacks came as a reaction to a missile attack during the Iran-Iraq War that caused damage to the Kuwaiti owned but US reflagged oil-tanker vessel *Sea Isle City* in 1987, and the damage caused by mines, a year later, to the warship *USS Samuel B. Roberts.* The US chose to attack the oil platforms because it was believed that the platforms collected and reported intelligence concerning passing vessels, acted as military communication link for Iranian naval forces and as military staging bases.

liberation-[371] and the interpretation of immediacy is of importance. Anticipatory self-defence in essence questions whether a State can act when the use of grave and threatening force against the State is about to happen and whether a State needs to wait until an actual attack has taken place.[372] Because anticipatory self-defence is relevant to the issue of whether self-defence can be invoked in relation to vessels carrying WMD, I will return to this subject more elaborately in paragraph 6.3.1.

6.2. Large scale naval operations

In several recent military operations the right of self-defence has been a legal ground for States to deploy their warships in a maritime interception role. With regard to the military campaigns, from 1990 onwards most notably, the first days of the military operations against Iraq (1990), the operation with regard to Afghanistan from September 2001 onwards, and the Israeli operations against the Hezbollah (2006) and Hamas (2009) are generally considered to be based on self-defence. Although the latter three operations have their peculiarities with regard to the application of self-defence against non-state actors, there is not much controversy on whether self-defence could be used in these instances. Rather, this practice has been taken to support the broadened scope of self-defence. The four conflicts mentioned produced five different military operations in which maritime assets were also deployed in a maritime interception role: First, the immediate military response to the invasion of Iraq in Kuwait in 1990; second and third, the military response against the attacks on the United States on 11 September 2001, operation *Enduring Freedom* and *Active Endeavour*; fourth Israel's military operations against Hezbollah in Lebanon (Operation *Change Direction*) in the summer of 2006 and finally the fifth, the Israeli operations against Hamas in since the end of 2008 (Operation *Cast Lead*).

[371] T.D. Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-Emption, Prevention and Immediacy' in M.N. Schmitt, J. Pejic (eds.), *International law and armed: exploring the faultlines - Essays in honour of Yoram Dinstein* (2007), 113-157, 125.
[372] Kretzmer (2013), 248.

6.2.1. Iraq (1990 -1991)

The UNSC's affirmation that the Iraqi invasion of Kuwait on 2 August 1990 was considered a situation activating the right of self-defence in light of the UN-Charter followed four days later, on 6 August, when the Council adopted SC-Res. 661 (1990). In addition, the UNSC in SC-Res. 661 also imposed a trade embargo on the import into the territories of all member nations of all the commodities and products originating in Iraq or Kuwait. Debate existed in on the legal basis of the maritime interception operations that occurred between the adoption of SC-Res. 661 and 665, because SC-Res. 661 was considered to be based on Article 41 of the UN-Charter[373] and did not authorize any seaborne enforcement actions. The US, and later the UK,[374] stated that it intercepted vessels at the request of Kuwait who were in violation of the UN-resolution, but considered those actions to be based on a continued right of self-defence.[375] It, therefore, although acting consistent with the Council's resolution, based their actions on self-defence.[376]

6.2.2. Enduring Freedom, Change of Direction and Cast Lead

Whereas the invocation of collective self-defence against Iraq in support of Kuwait in 1990 was straightforward in the sense that it was a state-to-state situation, invoking self-defence against Al Qaida in 2001 as a non-state actor, however supported by the *de facto* Taliban government of Afghanistan, inititated the main legal debate. While this debate on applicability of the law self-defence to non-state actors raged on from 11 September onwards in the academic arena, on 7 October 2001 the US and its

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[373] Gill, *NJB*, 1476; N.J. Schrijver, The use of economic sanctions by the Security Council: An international law perspective'', in H.H.G. Post (ed.), *International economic law and armed conflict* (1994), p. 133.

[374] J.H. Westra, *International law and the use of armed force* (2007), 113-114.

[375] Fielding (1997), 46-47; L.E. Fielding,'Maritime interceptions; Centrepiece of economic sanctions in the new world order', in *Louisiana Law Review*, vol. 53 (1993), 1191-1241; J.H. McNeill, 'Neutral rights and maritime sanctions: The effects of two Gulf wars', in *VGIL*, vol. 31 (1991), 631-643, at 641. The announcement ran as follows (quoted from; H.B. Robertson,'jr.,'Interdiction of Iraqi Maritime Commerce in the 1990-1991 Persian Gulf Conflict ', in *ODIL*, vol. 22 (1991), 289-299, at 295):

> U.S. Forces participate in a multinational effort that will intercept ships carrying products and commodities that are bound to and from Iraq and Kuwait. This action is consistent with UN Security Council Resolution 661, which imposed mandatory sanctions on trade with Iraq and occupied Kuwait.

[376] See also a recent comment on this episode which underlines this view, W. Heintschel von Heinegg,'Blockade and interdictions', in M. Weller (ed.), *The Oxford handbook on the international law of on the use of force* (2015), at 942.

coalition allies started Operation *Enduring Freedom* (OEF). For them, the legal basis for the military response to the attacks was clear from the outset: Article 51 of the UN-Charter. Their view was backed up by the UNSC in SC-Res. 1368 (2001).[377]

In the issue of *ratio personae* that came up as a legal debate after the 9/11-attacks, the statist presumption, as Gill states, was eventually left to include the possibility of invoking the right of self-defence against non-state actors.[378] This view also paved the way to more practice in which the right of self-defence was used in practice against non-state actors, in particular in operation *Change Direction* and *Cast lead*.[379] In July 2006, Israel launched Operation *Change Direction* after the Hezbollah raided the Israeli border from Lebanese territory and ambushed Israeli soldiers. Eight Israeli soldiers died and two were captured. Israel's military operation as a reaction was considered to be based on the right of self-defence, which was presented so to the UNSC.[380] Part of the military campaign that Israel launched against Hezbollah consisted of a belligerent naval blockade off the coast of Lebanon. Israel argued that "[T]he ports and harbours of Lebanon are used to transfer terrorists and weapons by the terrorist organizations operating against the citizens of Israel from within Lebanon, mainly Hezbollah". The blockade was lifted again on 7 September 2006 after which the UN implemented a maritime embargo operation (MTF UNIFIL) in support of Lebanon against Hezbollah.

Israel's maritime operations against Hamas in the Gaza strip since January 2009 would in first instance appear to be based on the traditional approach, but has yet another particularity with regard to MIO based on the right of self-defence. In this case, Israel seems to have taken the traditional approach in which it has based its military operations on the right of self-defence and accepts that an armed conflict exists. The application of military force is governed, therefore, by the *ius in bello*. Israel position towards the imposed blockade established on 3 January 2009 is that: 'A maritime blockade is in effect off the coast of Gaza. Such blockade has

[377] But see the discussion on the variety of decisions by states on which right of visit was to be used during OEF in Chapter 9.
[378] T. D. Gill, *The 11th September and the international law of military operations* (2002), 9.
[379] Ruys, 419-462.
[380] S/2006/515, 12 July 2006. The latter states: Israel thus reserves the right to act in accordance with Article 51 of the Charter of the United Nations and exercise its right of self-defence when an armed attack is launched against a Member of the United Nations. The State of Israel will take the appropriate actions to secure the release of the kidnapped soldiers and bring an end to the shelling that terrorizes our citizens.

been imposed, as Israel is currently in a state of armed conflict with the Hamas regime that controls Gaza. Although the blockade has been established since January 2009, the so called *Freedom Flotilla* incident in May 2010, only really grasped the attention of the international community and commentators of the existence of this blockade.[381]

6.2.3. Operation Active Endeavour

To support the US-led coalition after 9/11, NATO took eight measures, one of which was to deploy the NATO standing maritime force to the Eastern Mediterranean Sea to demonstrate NATO's 'resolve to help deter, defend, disrupt and protect against terrorism'. A day after the 11 September attacks the NAC stated that if it could be proved that the attacks were directed from outside the United States NATO would consider it an armed attack under the terms of Article 5 of the NATO-Treaty, which includes reference to Article 51 UN Charter. To NATO, satisfactory evidence was given to the NAC by the US on 2 October, which triggered the start of operation Active Endeavour (OAE). In the years following, the NATO-operation underwent several geographical evolutions to ultimately cover the complete Mediterranean Sea.[382] OAE, however, does not operate in the seas around the Arabian Peninsula.[383] Whereas separate members of NATO did take part, NATO as an organization neither took part in the OEF-coalition, nor in the early stage offensive military operations in Afghanistan.

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[381] J. Farrant, The Gaza Blockade incident and the modern law of blockade', in *Naval War College Review*, vol. 66, no. 3 (summer 2013), 81-98; E. Sanger, 'The contemporary law of blockade and the Gaza freedom Flotilla', in M.N. Schmitt et all (ed.) *YIHL*, vol. 13 (2010), 397-444; W. Heintschel von Heinegg,'Methods and means of naval warfare in non-international armed conflicts', in *ILS*, vol. 88 (2011), 211-236; D. Guilfoyle, 'The Mavi Marmara incident and blockade in armed conflict', in *British Yearbook of International Law*, Vol.81 (2010), 171-213; J. Kraska,'Rule selection in the case of Israel's naval blockade of Gaza: law of naval warfare or the law of the sea?', in M.N. Schmitt (red.) *Yearbook of humanitarian International Law*, vol. 13 (2010), 367-395; G.M. Scott, Israel's seizure of the Gaza-bound flotilla: applicable laws and legality', in *Research paper no. 42/2010, Osgoode Hall Law School*. R.J. Buchan, 'The Palmer report and the legality of Israel's naval blockade of Gaza', in *ICLQ*, vol. 61 (2012), 264-273.

[382] See Chapter 3, para. 3.1.2.2.

[383] Becker mentions an action from July 2002 against Al Qaida terrorists, which was presumably done within the context of OAE. Although it could have been warships from NATO-members, considering that the area of operations did not go beyond the Suez Canal, I hesitate to believe that the action was taken under NATO command. M. Becker,'Shifting public order of the oceans', in *Harvard International law Journal*, vol. 46 no. 1 (Winter 2005), pp. 131-230, at 152.

6.3. Self-defence against vessel-borne WMD and non-state actors

Self-defence is also argued as a legal basis to legitimize military action to thwart a threat from a vessel that may be carrying WMD, terrorists, or both.[384] On an operational level *Enduring Freedom* quickly expanded into the global war on terror (GWOT), in which the maritime dimension was translated into conducting so called expanded maritime interception operations (EMIO). EMIO aimed primarily to deny and disrupt the movement of terrorists and weapons of mass destruction, and, importantly, went beyond only Al-Qaida and its affiliates[385]. The actions taken against these potential terrorists, therefore, are not covered by the same invocation of self-defence that covers the use of force against Al-Qaida and its affiliates. Rather, in this case, self-defence is argued to thwart individual threats.

One has to note that although this approach is argued as a possible means to stop terrorists and WMD it appears that virtually no state practice exists that would further confirm the use of self-defence as an accepted approach by States to thwart terrorist or WMD vessels at sea.[386]

The interception of the *Karin-A* by Israel is often used as a potential terrorist threat or carriage of WMD on board. This is, however, in technical terms not a very good example because the *Karin-A* carried conventional weapons rather than WMD. In January 2002, the *Karin-A* was carrying more than 50 tons of (conventional) weapons destined for the Palestinian Authority and was intercepted by the Israeli Defence Forces in international waters, on its way to the Gaza. Israel argued self-defence in its letter to the UN-Secretary General.[387] Later, in March 2014, the *Klos-C* was

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[384] E.g. M.R. Schulman, The Proliferation Security Initiative and the evolution of the law on the use of force', in *Houston Journal of international law*, vol. 28 no. 3 (2006), 771-828; D.J. Nincic,'the challenge of maritime terrorism: Threat identification, WMD and regime response', in *The Journal of Strategic Studies*, vol 28, no. 4 (2005), 619-644; J.A. Doolin, 'The proliferation security initiative. Cornerstone of a new international norm', in *Naval War college Review* vol. 59, no. 2 (spring 2006), 29-57; J.I. Garvey, 'The international institution imperative for countering the spread of weapons of mass destruction: Assessing the proliferation security initiative', in *Journal of Conflict and Security Law* , vol. 10, no. 2 (2005), 125-147.

[385] Hodgkinson (2007), 583-670.

[386] Papastavridis, 'The right of visit on the high seas in a theoretical perspective: Mare Liberum versus Mare Clausum revisited', in *LJIL*, vol. 24 (2011), 45-69. He doubts on the Karin-A incident.

[387] In a letter to the UN-Secretary General (4 January 2002, A/56/766) Israel told the UNSC the following:

> The attempt by the Palestinian Authority to smuggle this unprecedented number of weapons is a flagrant violation of agreements reached between the parties and is an ominous sign of Palestinian intentions to continue their terrorist campaign well into the future.

boarded by Israel. Although the Israeli political message maintained that Israel must be able to defend itself, the Israeli boarding of the *Klos-C* appeared to be with the consent of the Panamanian authorities.

6.3.1. WMD and armed attack

Self-defence is often argued also as a legal basis to stop emerging threats from or via the sea, or to use Allen's more popular words, to stop *cargoes of doom*.[388] Within this scenario, vessels can for example be used for transportation of WMD to ports of a State, brought close to governmental vessels or critical infrastructure and pose a grave threat to those objects. Whether self-defence can be invoked in such cases, has to be assessed like any other claim to self-defence. In order to being able to react in self-defence against these so called *cargoes of doom,* one must in the first place consider whether the situation of a WMD on board a vessel constitutes an imminent armed attack. This by itself is challenging because the question rises whether the existence of dangerous cargo on board a vessel (or the combination of vessel and cargo) can constitute an armed attack. The only manner in which way this could be considered as an armed attack, would be through an anticipatory manner. 'At most', as Klein mentions, 'the shipment of weapons to support a terrorist attack against another State is a threat of force'.[389] The conditions for using self-defence in an anticipatory manner are the generally accepted *Caroline-criteria*: The danger or threat must be instant, overwhelming, leaving no choice for other means, and no moment for deliberation. Apart from the act that there must be a meaningful threat against the State (Joyner mentions that non-state actors that merely possess or are developing WMD, without the existence of a meaningful threat, do not satisfy the Caroline-criteria[390]), the main point of contention with regard to the anticipatory self-defence crite-

These weapons were capable of striking deep into Israel and their seizure constitutes a vital act of self-defence and an important counter-terrorist measure, that has saved Israeli civilians from an untold number of terrorist attacks against Israeli population centres.

[388] G.H. Allen, 'Cargoes of doom: national and multilateral strategies to combat the illicit transport of weapons of mass destruction by sea', in D.D. Caron, H.N. Scheiber (eds.), *The Oceans in the Nuclear Age: Legacies and Risks* (2010), 295-336.

[389] Klein (2011), 270.

[390] D.H. Joyner, 'The implications of the proliferation of Weapons of mass destruction for the prohibition of the use of force, in M. Weller (ed.), *The Oxford Handbook on the use of force in international law* (2015), 1034-1056, at 1043.

ria and vesselborne WMD, is related to the temporal dimension of self-defence, in particular with the interpretation of imminence.

Whereas in 'traditional' armed attacks the condition of immediacy relates to the temporal link between the attack and the reaction to the attack, in which no undue time-lag can take place between the attack and the reaction to the attack.[391] In the anticipatory context immediacy does not relate to after the attack but is interpreted in a different temporal perspective. As Gill states: 'Immediacy in the context of the *Caroline*-criteria for anticipatory self-defence is synonymous with the existence of imminent or immediate threat of an armed attack.[392] The temporal dimension in this case is not related to the reaction to an actual attack, but has to be interpreted in the context of when the armed attack might -in future- occur. Obviously, knowing when an attack will occur is a challenge. Ruys has noted in this respect that some scholars view that the temporal aspect of immediacy in anticipatory self-defence should not be part of what imminence in this case should entail.[393] If this is taken out, imminence becomes primarily a consideration of gravity of danger and the likelihood that it will occur. Akande and Liefländer, who also seem to be supporters of this view, argue that when severe threat exists, but still temporally remote one can still react as long as the action is necessary and proportionate.[394] Proponents of this view support the *last window of opportunity*-standard, in which a State must act or otherwise loses the opportunity to defend itself.[395] If it is only the *gravity* of the threat that must be considered, the ICJ in the *Nicaragua*-case has indicated that the existence of an armed attack must also be measured against the scale and effects of the use of force, to rule out mere frontier incidents.[396] Apart from the fact that this viewpoint has been much criticized[397], it may easily be argued that the use of chemical, nuclear of biological weapons can in fact have enormous effects. As Guilfoyle notes; 'The critical justification for pre-empting WMD is that attack's potential scale, not its temporal imminence".[398] Giving less

[391] Dinstein, 184.
[392] Gill (2007), 151.
[393] Ruys (2010), 320-321.
[394] D. Akande, T. Liefländer,'Clarifying necessity, imminence, and proportionality in the law of self-defense', in *AJIL*, vol. 107 (2013), 364-570, at 565.
[395] G. Mordarai, et all, 'The seizure of Abu Anas Al-Libi: An international law assessment', in *ILS* vol. 89 (2013), 817-839, at 823.
[396] ICJ, *Nicaragua* (merits), para 191.
[397] Ruys (2010), 520-524.
[398] Guilfoyle, (2005), 758.

importance to the more traditional approach of the temporal aspect of imminence would ultimately lead to support the position that WMD in the wrong hands are an imminent danger against which action can be taken, when also necessary and proportionate. Still, the temporal aspect cannot be completely discarded, as other factors, such as the ability to connect the danger to the victim State, become harder to assess. In that sense, the identification of the threat becomes less, the farther away the threat may be. It is in such circumstances also rather difficult to show that there is any intention of attack against a particular State. As Klein states, drawing a conclusion from the *Oil Platorms* case; "…the armed attack must clearly be targeted against the State that acts in self-defense".[399] The challenging issue is of how imminence should be interpreted in the context of modern threats is still without consensus.[400] Something may be a threat, but it is hard to argue it is a specific threat against a certain State that is highly likely to occur.

6.3.2.Reaction to armed attack: flag state jurisdiction and self-defence

Apart from the question whether a boarding of the vessel can be considered as a necessary and proportional measure of self-defence, Papastavridis also mentions that the act must also be imputable to a State.[401] Whether this condition still holds ground, depends on the view that is taken with regard to the issue of imputablity. Firstly, as mentioned by Van Steenberghe, cited earlier, practice seems to suggest that it is accepted that self-defence can also be invoked against non-state actors and is less dependent on a 'statist link'. In this respect, Bethlehem states: It is by now reasonable clear that states have right of self-defence attacks by nonstate actors'.[402] Secondly, this still leaves open the question of the geographical aspect of self-defence, where the non-state actor launches its attacks on from another territory. In the traditional sense, when an action is considered to be an armed attack, the reaction of the State can be directed against the territory of the State that launched the armed attack. It gets more complex when the attack is launched by a non-state actor from the

[399] Klein (2011), 264.
[400] D. Bethlehem, Self-defense against an imminent or actual armed attack by non-state actors, in *AJIL*, vol. 106 (2012), 769-777.
[401] Papastavridis (2013), 151.
[402] Bethlehem (2012), 774. See also Dinstein (2011), who is a strong proponent of the view that attacks by non-state actors can be considered as armed attacks in the context of the right of self-defence.

territory of another State where the action of the non-state actor is not attributable to the State. Either a relationship between the non-state actor and the State where the actions of the first can be attributable to the latter will justify an attack on the territory of that State. Two other views are that, as crossing borders obviously clashes with State sovereignity in cases where the conflict is not against that State, it is viewed that either sovereignity is irrelevant in this case, or that the competing rights of self-defence and sovereignty need to be balanced. The latter view, supported by practice, has gained growing recognition. Where there is no sufficient relationship, defence against an armed attack by a non-state actor can still be undertaken on that territory when the State is unable and/or unwilling to take action and the military operations are directed only against the non-state actors which are located on that territory.[403] The conditions mentioned to be fulfilled in case defence against of un-atributable armed attacks try to reconcile the use of force in self-defence against non-state actors with the interstate prohibition of the use of force and the idea that self-defence it not dependent on the will of another State, which needs to belanced against the sovereignity of State over its territory.[404] This view is for instance supported by Schmitt, who mentions that the US, and he himself, take the position that;

> 'if the sanctuary State fails to remedy the situation because it is either unwilling to do so (perhaps out of sympathy for the attackers) or unable to do so (for instance, due to a lack of the necessary military equipment), the victim State, in realization of its right of self-defence, may cross into the sanctuary State's territory for the sole purpose of defending itself'.[405]

Getting back to the maritime dimension, on the high seas it is not the territory of a State, but the jurisdiction of a flag State that comes into question.

[403] See on this practice Kimberley Trapp, who mentions Al Qaida ((2001) and Hezbollah (2006) as examples in which self-defence was used to act against non-state actors who deeds where not attributable to the State they were in (Afghanistan and Lebanon). K.N. Trapp, "Can non-state actor amount an armed attack', in M. Weller, *The Oxford Handbook of the use of force in international law* (2015), 679-719.

[404] M.N. Schmitt, 'Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law', in *Columbia Journal of Transnational Law*, vol. 52 (2013), 79-114, 87. J.J. Paust,'Self-defense targeting of non-state actors and permissibility of U.S. use of drones in Pakistan', in *Journal of Transnational Law & Policy*, vol. 19. No. 2 (2010), 237-280.

[405] Schmitt, (2013), 89.

Applying the same view as mentioned above, such argumentation would lead to the view that States can also act against non-state actors on board a foreign flagged vessel, under the limiting circumstances that a flag State is unable or unwilling to act or remedy the situation. In the context of stopping WMD and non-state actors it is argued that self-defence can be another exception to flag state jurisdiction.[406] Hodgkinson *et al*, for example, discuss the right of self-defence under Article 51 of the UN-Charter in the context of acting against WMD and state that self-defence could be a legal basis to board a vessel suspecting of harboring terrorists. They then go on to opine that; "boarding such a vessel, mounting an inspection, and obtaining biometric data from its crews or passengers, even without the ship master's consent, could be viewed as proportional to a great enough threat". This is interesting, because in cases of international armed conflict LOAC (*ius in bello)* allows for boarding foreign flagged vessels through a distinct set of rules that are part of the law of naval warfare. Instead, in the above view in the context of WMD or non-state actors, the authority to board is argued from a perspective of the *ius ad bellum,* in particular from the perspective of the debate whether self-defence can be invoked against non-state actors and where (geographically) non-state actors can be attacked, and not through the subsequent application of LOAC. Arguing self-defence in this manner would provide a sufficient way of side stepping the exclusive jurisdiction of a flag State because it theoretically allows for the boarding of a foreign flagged vessel without any form of consent of the flag State. On this issue in the context of interception operations Von Heinegg is very articulate in a number of his articles and a strong proponent of the possibility that interception operations can be based on self-defence, which in his opinion prevails over the flag state principle.[407] He opines that consent of the flag State or the master in the context of self-defence is irrelevant; "as the right of self-defence has never been made dependent upon the will of Third States or of individuals".[408] To the author, self-defence does not by definition prevail over consent of the flag State, but only prevails when the conditions of an unwilling and/or unable flag State are also satisfied. Consent of the flag State, there-

[406] E.g. Walker, Fitzgerald.
[407] Heintschel von Heinegg, (2010), 389-390.
[408] W. Heintschel von Heinegg,'Current legal issues in maritime operations: Maritime interception operations in the global war on terrorism, exclusion zones, hospital ships and maritime neutrality', *in IYIL*, vol. 34 (2004), 151-178, at 154.

fore, stays relevant in the sense that a extra hurdle must be taken to argue why consent is not required in the particular circumstance.

6.3.3. Advantages of the ius ad bellum approach to boarding

The interesting point of the above argumentation is that where in the traditional view of boarding a vessel in situations of self-defence is based to the applicable legal regime (LOAC), in this view boarding of a vessel is now directly connected to self-defence. Taken against the reality of modern conflict, this view has its operational advantages. In the first place, it circumvents the operationally challenging issue of flag state consent to board a foreign flagged vessel. Within the context of high seas shipboarding, it would mean that where a flag State is unable or unwilling to act against the WMD, the ship can be boarded in self-defence. Such argumentation also opens the door to be able to board vessels that within the political scheme of things would never have consented to let board its vessels. For example, a North-Korean flagged vessel that is subject to a boarding by an American warship. Obviously, still the stringent conditions of self-defence need to be met.

Apart from the flag state consent issue, a second advantage of connecting to right to board to the *ius ad bellum* instead of the *ius in bello* is that it bypasses the question of whether the law of naval warfare applies in non-international armed conflict or against non-state actors. To take to Afghanistan example, it is widely viewed that the situation in Afghanistan changed after the Taliban had been brought to a fall and the *Loya Jirga* was convened in June 2002. First, many commentators view that the status of the armed conflict changed from that point onwards from an international armed conflict to a non-international armed conflict.[409] A common view with respect to the applicability of prize law, which the belligerent right of visit is part of, is that prize law is only applicable in international armed conflicts.[410] The application of the belligerent right of visit and search, therefore, poses extra challenges in applying it in new threats.

[409] See e.g. J. Pejic,'Unlawful/enemy combatants: Interpretations and consequences', in M.N. Schmitt and J. Pejic (ed.), *International law and armed conflict: exploring the faultlines* (2007), pp. 335-355, at 345. .

[410] W. Heintschel von Heinegg,'The law of military operations at sea', in T.D. Gill, D. Fleck, *The handbook of the international law of military operations* (2010), 325-371; J. Kraska,'Rule selection in the case of Israel's naval blockade of Gaza: Law of naval warfare or law of the sea?' in, *YIHL*, vol. 13 (2010), 367-395.

This subject in particular, with regard to the right of visit during NIAC's will be discussed in Chapter 9.[411] As the law of self-defence is gradually moving into the direction of accepting the use of force against non-state actors without State attribution, the essence of the issue relates to the question whether prize law can also be applicable in non-international armed conflicts or transnational armed conflicts. With regard to the latter type of conflict, which has no distinct legal regime, there is a tendency to view that in transnational armed conflicts the regime applies of non-international armed conflict applies.[412] Taking the above mentioned views as the point of departure, for States that apply the authorities of the law of naval warfare, the status of the conflict has impact on the authorities. But when the right to board another vessel is based on self-defence rather than the belligerent visit and search, the change of status of the conflict is in fact irrelevant. It stops, in other words, the need to articulate the status of the conflict.

Interestingly, one author has noted a debate on the so called "third-tier", in which the conditions of self-defence are used as a third legal regime, next to IHRL and LOAC.[413] In this approach the law of self-defence provides both a basis *and* a legal regime for and during military operations. The law of self-defence is not only used to determine whether force *can* be used, but also provides the scope of authorities -in a MIO-context- during the boarding, based on the conditions for the application of military force under the law of self-defence (proportionality, necessity, immediacy). Geoffrey Corn (a fervent opponent of this view) has noted that proponents of the third tier can avoid assessing the nature of hostilities and how they implicate *ius in bello* applicability.[414] This is obviously a convenient argument in current day conflict and fits neatly in the view that WMD can be stopped and seized on board a foreign flagged vessel, solely based on self-defence. This argument of using self-defence as a right to visit in the context of maritime interception operations is also found in a document from the US-Defence Department organization *Defense Institute of Legal Studies* (DILS), who notes that:

[411] See paragraph 9.4.3.
[412] C. KreB,'Some reflections on the international legal framework governing transnational armed conflicts', in *Journal of conflict and Security*, vol. 15. No 2 (2010), 245-274.
[413] G. Corn, 'Self-defense targeting: blurring the line between the ius ad bellum and the ius in bello', in *ILS*, vol. 88 (Naval War College, 2012), 57-92.
[414] Corn (2012), 73.

> The maritime interception operation has, through accepted practice and custom, developed a new legal regime under which, with the proper legal antecedents (i.e., UN authorization or national or collective self-defense under Article 51 of the UN Charter) warships may intercept foreign flag commercial vessels on the high seas, without resorting to any classical belligerent right. In fact, this expansion is now well seasoned through over ten years of continuous, unchallenged operations. Indeed, a substantial number of maritime nations have actively participated in the Arabian Gulf MIO.[415]

Apart from the *Karina-A* incident, it is hard to tell whether practice actually exists where self-defence was used as a direct legal basis to stop WMD or terrorists. Although the above blurb from DILS concludes as such and the US has always taken the standpoint that OEF was conducted under self-defence, it has always left it unspecified whether it used LOAC to regulate its boardings. More back into history, the Algerian Independence War (1955-1962) is interesting to note in this respect. Firstly, the visits and searches conducted by the French naval forces during the Algerian Independence War are mentioned by some[416] as MIO conducted based on self-defence rather than the law of armed conflict.[417] France's challenge in this situation was that it did not recognize the Algerians insurgents as belligerents, thereby depriving itself from the possibility to use the law of armed conflict.

6.4. Conclusion

Current day conflict, characterized by non-state actors, NIAC's and WMD poses challenges for maritime interception operations. In the quest to counter these modern challenges different views on how self-defence can be a legal basis for are embraced. The right of self-defence is now argued

[415] *DILS*, Maritime interception operations, 13 June 2005.
[416] Churchill and Lowe, 216-217; W. Heintschel Von Heinneg; Visit, search, diversion and capture – condition of applicability', in *Reports and commentaries of the round table of experts on international humanitarian law applicable to armed conflict at sea* (Bochum 1995), 1-93, at 56-57. Everyone quotes each other however
[417] O'Connell notes that: "The competence of the French Navy to carry out such visits and searches, although challenged apparently at the diplomatic level, did not form the subject of action in French courts. This is because in French law it is possible to test in the courts the validity of a seizure of cargo but not the preliminary issue of the validity of visit and search, which is an act of government". He mentions a French note that contended that the visits were justified by the French based on self-defense. D.P. O'Connell, International Law and Contemporary Naval Operations', in *BYIL*, vol. 44 (1970), 19-68, at 36.

as a basis for maritime interception operations in two different approaches. Firstly in a traditional way, where self-defence serves as a legal basis upon which large scale naval operations are conducted that may include maritime interception operations. Secondly, in the fight against non-state actors in NIAC's and WMD, self-defence serves as a direct legal basis to conduct a MIO. The key-difference is that in the traditional approach, self-defence is a condition that allows for to application of the law of armed conflict. LOAC -*ius in bello*- then provides the right to board vessels, albeit limited to international armed conflicts. In the other approach, related to NSA and WMD, the right to board a foreign flagged vessel is derived from the *ius ad bellum* itself, which brings unique characters into play, such as the argument that the use of self-defence is not dependent on other States. Connecting to the debate on crossing borders, it is viewed that NSA can, under certain conditions, can be attacked beyond the attacked State's borders in other States. A translation to the maritime dimension would lead to the conclusion in this argumentation that foreign flagged vessels could be boarded based on self-defence when the flag State is unable and/or unwilling to act themselves. Advantages to use self-defence in such a way are primarily that it circumvents the issue of flag state consent. It is advantageous both in the fact that there is no need in to gaining timely consent, and in situations where the State will politically not give consent. A further advantage is that it allows disregarding the position that the right to board a vessel in the law of naval warfare only applies in international armed conflicts, which makes it not very useful in current conflicts which are often characterized as non-international. The attractiveness to such argument, therefore, is rather high when one needs to deal with current threats and conflicts. Regardless of the attractiveness, however, the conditions of the law of self-defence have to be met, and as such is not a *carte blanche* to circumvent flag state consent or LOAC.

CHAPTER 7

(ad hoc) Consent

7. Introduction

Consent of a State to allow another State the use of its armed forces on its territory or aboard its flagged vessels may serve as a legal basis for maritime interception operations. Within the maritime context this could firstly mean that a coastal State will consent to allow maritime interception operations by foreign warships within its territorial sea or internal waters. Secondly, this could mean that a flag State allows the boarding of its vessels by foreign warships on the high seas. The legal basis of consent for military operations[418], and for maritime interception operations in particular, is in fact often used. Guilfoyle mentions that consent-based interceptions are much used in law enforcement operations, for instance in relation to drug-smuggling, fisheries management and transnational crime.[419] A well-known situation that addressed consent in the maritime context and has reached the ECHR is the *Medvedyev*-case.[420] In early June 2002 the French authorities requested permission from Cambodia to intercept the Cambodian flagged vessel *Winner* that was suspected of carrying large quantities of drugs. France requested and got the authority via a diplomatic note exchange between France and Cambodia.[421] The French warship *Lieutenant de vaisseau Le Henaff* was instructed to intercept the *Winner* and did so near the Cape Verde Islands. France based its action on three legal bases.[422] Article 108 UNCLOS, the diplomatic note, and the argu-

[418] To illustrate with a recent military operation, in 2013 the French operation *Serval* was based on the consent of Mali authorities to rid the state of terrorist that had taken control of parts of Mali. On this operation see, K. Bannelier, T., Christakis, 'Under the UN Security council's watchful eyes: Military intervention by invitation in the Malian Conflict', in *LJIL*, vol. 26 (2013), 855-874.
[419] Guilfoyle, (2009), 342.
[420] ECtHR, *Medvedyev and others v. France*, application no. 3394/03. Judgment 29 March 2010.
[421] *Medvedyev*, para 10.
[422] *Medvedyev*, para 82-101.

ment that the vessel was not flying a flag and refused to identify itself. The ECtHR dismissed the first argument because Cambodia is not a party to UNCLOS and also because Article 108 does not cover situations of requests to board third State vessels. The ECtHR also dismissed the second legal basis because the nationality was in fact already known before the *Le Henaff* physically encountered the *Winner* and as such considered the argument contradictory to the claim it was without nationality. The third legal basis, the diplomatic note, however was considered by the court as an *ad hoc* agreement between France and Cambodia and thus a source in international law. Although the ECtHR considered the note verbale not sufficiently clear on the fate of the crew, it did not reject the view that the note could be a legal basis to board the vessel.

There are a few other incidents also in which the boarding of a vessel were carried out on the basis of consent. In March 2014, Israel boarded the Panama-flagged *Klos-C* on suspicion of carrying a large bulk of weapons (surface-to-surface rockets) in the Red Sea on its way to Sudan, ultimately destined for the Gaza in an operation codenamed operation *Full Disclosure*. According to the Foreign Affairs minister of Israel, it had obtained permission from Panama to board the vessel.[423] The vessel was diverted to Eilat and the crew members, who according to an Israeli spokesman were not aware of the content of the cargo, were released. In addition to individual cases, the NATO-led operation *Active Endeavour* (OEA) is a MIO whereby the boarding operations are entirely based on consent. In 2003 NATO decided to undertake interception operations in the context of OAE.[424] With regard to the authorities to perform boardings by participating warships, NATO decided that such boardings can only be undertaken when they were of a *compliant manner*.[425] NATO understood compliant boardings in the case of OAE as requiring prior authorization from both the State *and* the master to board a foreign vessel. UNSC-practice also exists in relation to consent based maritime interception op-

[423] D. Williams, 'Israel seizes arms shipment', Reuters, 5 March 2014. Williams reports that:
> Foreign Minister Avigdor Lieberman said Israel had obtained Panama's permission to board the ship. "We followed international law to the letter. The ship travelled under a Panamanian flag, the company was listed in Marshall Islands, the captain was Turkish and the crew was from various different countries," he told a conference in Tel Aviv.

At: http://www.reuters.com/article/2014/03/05/us-israel-gaza-ship-idUSBREA240X720140305.
[424] http://www.manp.nato.int/news_releases/mcnaples/pressreleases11/NR_52_11.html.
[425] The term "compliant boarding" is not often used anymore. It's more common to speak of *consensual boardings*. See Chapter 2 on the terminology of boarding operations.

erations. In SC-Res. 1929 (2010) relating to Iran, the UNSC has underlined the possibility of boarding foreign flagged vessels under the condition that the flag State consents to the boarding. Also SC-Res. 2146 (2014) with regard to the Libyan crude oil export prohibition, the UNSC notes that States should first make efforts to ask the flag State for authorization before boarding the vessel.[426] In sum, therefore, it is accepted in both practice and jurisprudence that consent is an internationally accepted legal basis for maritime interception operations. The application in the maritime dimension of the conditions under which consent can be a legal basis are, however, not crystal clear. The main point of contention is whether alongside the authorities of the flag State, the master of the vessel is authorized to validly consent to a boarding.

In his commentary to the ILC- Draft Articles on State Responsibility, James Crawford has given two meanings to the notion of consent in international law.[427] In the first meaning consent is seen in the context of state responsibility and viewed as a circumstance that precludes wrongfulness of State actions when the other State has consented to this action. In the second meaning consent must be seen within the context of the law of treaties and as a basis for the existence of international agreements and the suspension of international obligations that flow from such agreements. The legal basis to the use of force on the territory of another State or on board a foreign flagged vessel is viewed as part of the first meaning, and will be dealt with in this chapter. Consent as used in the second meaning will be dealt with in the chapter on international agreements. Consent, in any case, is a attribute of sovereignity in which a State may always (not) consent to a foreign State conducting activities that would otherwise violate its sovereignity. This chapter aims to consider some points of contention with regard to consent-based maritime interception operations. Consent can manifest itself as a legal basis for maritime interception operations from three vantage points. The first is consent from a State to board its vessel on the high seas. This type of consent concentrates on the vessel itself. Second is the notion of the statelessness of vessels. This type of

[426] SC Res. 2146 (2014), paragraph 6 reads:

Requests that Member States, before taking the measures authorized in paragraph 5, first seek the consent of the vessel's flag State;

[427] Commentary no. 2 on article 20 of the draft articles of state responsibility. See also C. Farhang, 'The notion of consent in part of the draft articles on state responsibility', in, *LJIL*, vol. 27 (2014), 55-73.

consent is realized by the lack of a responsible flag State. And third is the consent of a State to conduct MIO in the maritime zones over which a coastal State has jurisdiction. This type of consent focuses on the geographical area over which a State has jurisdiction. As this last subject falls outside the scope of the thesis, it will not be discussed here.[428]

This chapter will address the above mentioned contexts in two parts. It will first consider the conditions for consent in general international law, and will apply these conditions in the context of consent in maritime interception operations on the high seas. The second will discuss MIO in relation to stateless vessels. Obviously, the issue of statelessness is not a matter of consent *strictu sensu*, but it relates in so far that challenges exist when there is no State that can give consent.

7.1. Legal framework consent

Consent is not generally considered from the perspective of the prohibitions of the use of armed force within the framework of the UN-Charter, but as a circumstance that precludes the wrongfulness of actions by a State.[429] Article 20 of the ILC-Articles on State Responsibility (DARS) states that valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent. Sovereignty implies that within the limitations of international law a State may allow another State to use its military within the area over which the consenting State has sovereign powers. Consequently, consent of a State can allow another State to engage in operations in relation to areas, objects, or persons subject to its jurisdiction. Or, in the words of Wendel in the context of MIO: The fact that the flag State authorizes another State to board a vessel flying the flag of the former State, precludes the wrongfulness of the boarding in relation to the flag State.[430]

[428] See on this subject R. McLaughlin, *United Nations naval peace operations in the Territorial Sea* (Martinus Nijhoff publishers, Leiden, Boston, 2009).
[429] UNGA resolution 56/83 (12 December 2001): Responsibility of states for internationally wrongful acts, article 20. Crawford mentions under commentary no. 4 that: A consent must be valid, which includes issues of whether the agent or person who gave the consent is authorized to do so on behalf of the state, or whether the consent was vitiated by coercion or some other factor.
[430] Wendel (2007), 165.

The point to note regarding consent, as also underlined in the ICJ-case *DRC v. Uganda*[431] and mentioned by Crawford under commentary no. 4 of Article 20 DARS, is that that a consent must be *valid*. This includes issues of whether the agent or person who gave the consent is authorized to do so on behalf of the State, or whether a consent was achieved through coercion or some other factor.[432] Based on Crawford's commentary, Gill considers within the context of military operations in general that the primary three conditions for consent to be a true legal ground are: a consent, which must be 1) granted freely, and 2) issued by the lawful authority of the 3) consenting State.[433] The first condition underlines that there should not be any form of threat or compulsory action aimed at the State to give consent. It is also always subject to any condition that the State may pose and may always be terminated. As such, military operations based on consent must be conducted within the limits of the given consent. This condition interrelates with both legal basis and regime: if on the one hand action is taken based on consent which goes beyond the substantial scope of the consent (legal regime) that is given, the consent may lose its validity to serve as a legal basis. The third condition underlines that consent must ultimately be attributed to the State as the authority that can decide on whether or not to allow military operations within its jurisdiction. What also flows from this, is that the consenting State may not grant more authority than it posseses. In particular, condition two and three raise debate within the context of maritime interception.

7.1.1. The consenting authority

Conditions two and three essentially deal with the question of the consenting authority to allow a boarding to take place on a foreign flagged vessel. In the first place, consent to board a foreign flagged vessel cannot be implied to exist. This may for instance be the case in instances where a State requests to board another vessel, but no answer to the request is given. In the prompt release case between The Netherlands and the Russian Federation before the ITLOS, concerning the Netherlands flagged Greenpeace vessel *Arctic Sunrise*, this point was also argued by the Netherlands, who

[431] ICJ, Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda) judgment of 19 December 2005.
[432] J. Crawford, *ILC articles on state responsibility: Articles and commentaries (2002)*, 163-165.
[433] Gill (2010c), 230.

opined that: 'Any exceptions to the general prohibitive rule to exercise enforcement jurisdiction over foreign vessels are explicit and cannot be implied'.[434]

With regard to the consenting authority within the context of maritime interception operations there are two main questions that are part of the current debate. The first question is the issue of who the consenting authority can be. The second is the question of the actual scope of the consent. The latter question is a question of applicable legal regime, but has significant impact on whether or not a consensual boarding is legal and is therefore difficult to separate. The first question refers to the core debate whether or not consent of the flag State is needed (flag State consent) before a boarding party boards a merchant vessel that flies a different flag than the warship, or whether the consent of the master of the vessel provides an adequate authority to do so (master's consent). The existence of these two views could raise confusion when a warships' crew that is allowed to visit based on master's consent according to its national view, boards a vessel of a nation that views flag state consent as the only legally correct ground of visit. Although it is in fact immaterial what the view of the boarding State is, the commander of the visiting warship may - incorrectly- view that he has handled the situation correctly based on the national legal view. One can imagine that this is a recipe for potential legal and diplomatic problems.

7.1.1.1. Flag state consent

The principal argument for flag state consent is the view that sovereignty, on which the principle of non-interference of vessels is based, is a State instrument and cannot be waived by individuals like the captain of a ship. The view is taken that the captain of the vessel is in most instances not an official representative of a State and therefore cannot waive the State's jurisdiction,[435] particularly when the captain of the vessel does not have the same nationality as the flag State. Proponents of flag state consent furthermore argue that because of its nature and purpose it is difficult for a

[434] ITLOS, case no. 22. *Arctic Sunrise*, order of 22 November 2013 , para. 63.
[435] See P.J.J. Van der Kruit (ed.) *Handboek voor de Maritieme Rechtshandhaving (draft version, 2010*), p. 84.

visiting warship to be conducting activities that could not be considered as being the prerogative of the flag State. When flag state consent is given by the State concerned, the master should then comply with the visit of a foreign warship.

7.1.1.2. Master's consent

Both master's and flag state consent take the same principle of sovereignty of the flag State over vessels as the legal point of departure. The proponents of master's consent however argue that the consent of the flag State in certain cases is not needed and that the consent of the master proved sufficient authority. The *Commander's Handbook on the Law of Naval Operations* of the United States views master's consent as follows:

> A consensual boarding is conducted at the invitation of the master (or person-in-charge) of a vessel which is not otherwise subject to the jurisdiction of the boarding officer. The plenary authority of the master over all activities to the operation of his vessel while in international waters is well established in international law and includes the authority to allow anyone to come aboard his vessel as his guest, including law enforcement officials.
> The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority (such as arrest or seizure). A consensual boarding is not an exercise of law enforcement jurisdiction per se. Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue to the boarded vessel.[436]

In other words, the master of the ship has the authority to allow persons on board as long as the boarding party does not perform any law enforcement activities. Therefore, proponents of the concept of master's consent argue that visits by foreign flagged warships can be authorized by the master of the vessel as long as the visiting warship's crew does not perform any law enforcement activities.

Several arguments are put forward to support this view, such as the existence of *flags of convenience* that cause a certain level of legal disconnect

[436] A.R. Thomas & J.C. Duncan, 'Annotated Supplement to the Commander's Handbook on the Law of Naval Operations', Vol. 73 *ILS* 1999, p. 240, Section 3.11.2.5.2.

between the flag State and the vessel that flies its flag[437] and the view that visiting a vessel does not mean that the boarding team is actually stepping on the territory in the legal sense of the flag State.[438] The main argument for master's consent is however a practical one. As Becker states, it is viewed that: "Where procedure for requesting and authorizing flag state consent are not predetermined by agreement, the process can be slow or, in the worst case, a failure if the target is allowed to escape before operations can begin".[439] The reasons for the delay could be many. For instance, a nation does not have a single point of contact or an internal procedure to find a fast answer. Often many actors need to be consulted before consent can or cannot be granted. The second PSI principle therefore also underlines that States undertake to streamline procedures "for rapid exchange of relevant information concerning suspected proliferation activity (…)".[440] Also more political reasons could explain why a nation does not want to answer or consent to boarding. One could imagine that, for example, Iran will not consent to the United States boarding a vessel flying its flag. Also revealing information to support the request for boarding may give difficulties as the intelligence may be classified. As Brown writes: "However, for States with strained diplomatic relations with the United States, particularly if the evidence of terrorism activity is withheld as classified intelligence, consent may be more difficult to obtain".[441] Also Wilson's argument with regard to flags of convenience to support master's consent seems to come from a practical point of view.[442] He asserts that States with open registries, next to the fact that there is no genuine link between the vessel and the flag State, are often also vulnerable to political upheaval and do not take jurisdictional responsibility over the vessel. As such: "The recognition and continued existence of master's consent is crucial as

[437] Wilson, 170-185.
[438] T.M. Brown, 'For the "Round and Top of Sovereignty": Boarding Foreign Vessels at Sea on Terror-related Intelligence Tips', Vol. 59 *NLR* 2010, p. 81.
[439] Becker, 178.
[440] Shulman, 827.
[441] Brown, 83.
[442] Another more practical point is that a warship can have a potentially threatening posture. By analogy, as Greenwood remarked, in the context of confiscation of goods in enemy territory, 'the request by a heavily armed soldier that is requesting to search the house may in fact not be an actual request'. It cannot be ruled out that law abiding merchant vessel captains will be overwhelmed by an approaching warship and will readily invite the boarding party at the warships request aboard, without also knowing where the limits of the authorities of the crew are. In this sense, flag state consent at least supposes that the requestor and the requested remain on a more equal level.

a valid alternative where the flag state consent is not possible or practical".[443]

7.2. Analysis

There is a common understanding that a captain of a vessel is free to invite persons on board as his guests, which could include military personnel.[444] No one will disagree that also military personnel can be invited for instance to a cocktail party aboard a merchant vessel without the captain having to show the guest list to the flag State for approval. The purpose of such a visit is, however, significantly different than from a visiting warship's crew in pursuit of their official duties. There is also a deep rooted understanding in maritime law that the master of a vessel has responsibility for the safety of his vessel, from which certain legal authorities are derived. Some domestic legislation may under certain circumstances even allow the master of the vessel to perform specific law enforcement activities over the crew of the vessel. These activities are, however, limited to the purpose of safeguarding the safety of the vessel and cargo and do not extend to authorities for the master according to which the exclusive jurisdiction of a flag State can be waived. Some argue that for the safety of his vessel a master can invite third States to support the master. This view is also underlined by Article 27 UNCLOS,[445] which mentions that whilst sailing through the territorial sea of a coastal State the master can ask for the assistance of the coastal State authorities. This is, however, a different situation then a situation when the vessel's safety is not at stake and it is not the master that is asking for assistance, but is being ask to be board on the suspicion, for instance, that the vessel is used to transport prohibited cargo or possible criminals.[446]

That the principle of master's consent exists is, therefore, not contested. Be that as it may, an invitation of the master does, in the first place, not provide any sort of law enforcement authority to the boarding party aboard the vessel. Second, persons in their official capacity in the pursuit of their task must take into account the limits of their authority. The crux of the matter essentially lies in the nature of the activities of the boarding

[443] Wilson, 185.
[444] See also Kraska, 'Broken Taillight', (2010), 16.
[445] Art. 27 sub 1 (c) UNCLOS.
[446] Hodgkinson, 583.

party and whether or not the boarding party does something that would fall under the authority of the flag State. In other words, the purpose of the visit is essential to the question whether a master's or flag State consent is needed. What is in fact contested is which authority master's consent will create to a boarding party of a foreign warship.

The difficulty lies in drawing the line between action by naval personnel that does or does not imply some form of law enforcement, or does not involve any activities that may threaten the sovereignty of the flag State. The example of the cocktail party is easy, but gathering intelligence that may end up supporting military or law enforcement action becomes more blurry. When one accepts that a master can invite persons on board, the dividing line between an authorized and an unauthorized visit may even be as thin as a difference in the manner of querying the crew of the vessel. The US *Commander's Handbook on the Law of Naval Operations* mentions that checking paperwork during a boarding granted by the master's consent is a permitted activity. Roach supports this view to argue that checking the vessels documents, cargo and records, are "non-jurisdictional actions".[447] Another view would be that checking the validity of paperwork and cargo manifests are actions that are usually performed by government officials and in that sense could fall within the realm of law enforcement activities. Von Heinegg appears to draw the line at verification of the vessel's true nature. This for him includes verifying cargo, documents and destination, but does not go as far as enforcement measures if in case irregularities of some sort would come from the verification.[448] In the authors' view, if consent is given by a master the come on board, they are basically nothing more than his guests and no law enforcement authority can flow from this. The master is not required to hand over any documentation of vessel or cargo, unless this is permitted through domestic legislation. In this sense, one can relate to the view of Matteo Tondini, who mentions that: 'the legal basis for boarding a vessel with the master's

[447] A. Roach, 'Developments in the Law of Naval Operations', in R. Lefeber (ed.), *Contemporary International Law Issues: Opportunities at a Time of Momentous Change* (Dordrecht, Martinus Nijhoff, 1993), p. 337.
[448] W. Heintschel von Heinegg, Blockades and interdictions, in M. Weller (ed.), *The Oxford Handbook on the use of force international law* (2015), 925-946, at 942.

consent only […] remains questionable when exercised other than for maritime safety reasons.'[449]

7.2.1. Practice: the "broken taillight-approach"

Interestingly, in practice a *modus operandi* has evolved which at times is characterized as the so called "broken-taillight-approach".[450] The approach refers to the police officer that stops a car because of a broken taillight, but then discovers (or already knew beforehand) the drugs on the backseat of that same car, which will subsequently be taken by the police officer. The scenario has been used in the context of trying to find ways to board vessels in order to stop WMD at sea.[451] The broken taillight-approach, in other words, is used as an argument to find whatever ways to be able to board a vessel.[452] Whereas the broken-taillight approach signals 'pushing the envelope' on the legal limits of existing legal possibilities, the search for lawful boarding options on a practical level and within the context of MSO has also resulted into a practice in which master's consent plays a significant role. In the naval operators' dimension, these actions are familiar under the term 'friendly approaches' or 'approach and assist visits' (AAV).[453] Lieutenant Marsden explains:

> "Over the course of an average day we will conduct between 5 and 20 Approach and Assist visits to fishing and trading dhows of various sizes", said Deputy Logistics Officer and Boarding Officer Lt Chris Marsden RN [Royal Navy, MDF]. "The boats' crews are generally pleased to see us and we are often able to help out by providing them with supplies and information ranging from deteriorating weather conditions to the latest cricket scores! In return the crews are able to provide us with details of any suspicious activity in the area, which we can then act upon".[454]

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[449] M. Tondini, 'The legality of intercepting boat people under search and rescue and border control operations', in *The Journal of International Maritime Law*, vol. 12 (2012), 59-74.
[450] J.M. Kraska, 'Broken taillight at sea: the peacetime international law of visit, board, search and seizure', in *Ocean and Coastal Law Journal*, vol. 16 no. 1 (2010), 1-46.
[451] J. Su,' The Proliferation Security Initiative (PSI) and Interdiction at Sea: A Chinese Perspective', in *ODIL* no. 43 (2012), 96-118, 103.
[452] Kraska, 'The broken taillight at sea', 14.
[453] See e.g. *CMF press release*, 24 March 2013, 'HMS Monmouth conducts Maritime Approach and Assist operations'. At http://combinedmaritimeforces.com/2013/03/24/hms-monmouth-conducts-maritime-approach-and-assist-operations/. US Navy press release, Ramage VBSS team conducts 100th Approach and assist visit', at http://www.navy.mil/submit/display.asp?story_id=42177.
[454] *CMF press release*, 24 March 2013, 'HMS Monmouth conducts Maritime Approach and Assist operations'. At http://combinedmaritimeforces.com/2013/03/24/hms-monmouth-conducts-maritime-approach-and-assist-operations/.

The information gathered through engaging the maritime community in a certain area adds to the maritime awareness and may ultimately be a piece of the puzzle which results in actionable intelligence. Allen mentions that this practice during maritime security operations in which crew of warships board at the invitation of the master to approach the maritime community point into the direction that master consent is in practice in fact tacitly accepted even by States such as the United Kingdom, who are proponents of flag state consent.[455] An AAV may also include coming on board the vessel in which the warship is engaged with. This *modus operandi* is supported also by the definition of approach used by the EU-Operational Order (OPORD) for operation *Atalanta,* which is quoted by Papastavridis:

> An approach is defined by a de-escalatory low key interaction. This may include visits on board if invited, but does not include 'boarding exploitation' of the vessel (crew checks, searching cargo/crew)…the approach is an informal means of engaging with the maritime population to continue the conversation on board his vessel…this is not considered as a boarding in a legal sense.[456]

In performing 'friendly approaches' or AAV's, therefore, naval operators seem to take care of staying away from any activity that may be seen as a law enforcement activity. Interestingly, the EU, possibly in order to try to create some clarity, seems to have divided in boardings in the legal sense and boardings in the non-legal sense. The latter is a boarding in which the boarding party is physically on board another vessel at the invitation of the master and does not perform any activities that may possible be seen as law enforcement actions. Although this is essentially a form of master's consent, this EU-approach with regard to the purpose, therefore, goes less far as the view of the United States, underlined by Kraska, who mentions: *'Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue delay to the boarded vessel.'*[457] With this practice, we see a certain level of acceptance of

[455] Allen (2014), 259. Examples from UK-practice can be found at: http://eunavfor.eu/eu-naval-force-ship-rfa-lyme-bay-conducts-friendly-approach-with-local-seafarers/.
[456] Papastavridis (2013), 59 footnote 107.
[457] Kraska,'Broken taillight' (2010), 17.

master consent, but still a difference in opinion with regard to the scope of authority that a boarding party has under the invitation of a master.[458]
In summary, the above paragraphs have shown that with regard to *ad hoc* consent in the context of MIO, basically two -closely related- points of contention exist. The first is a difference in view whether a State allows either master or flag state consent boardings with regard to their vessels. The second is a difference in view, or rather debate, on what the scope of authorities would be when a master consent boarding is carried out. These two points are, as said, closely related because whether a State would allow a master consent boarding may also depend on the scope the activities of a boarding party. A State may find itself in agreement with a *de facto* boarding in order to acquire information about the area or to support its vessels with any safety issues, but may not agree with a boarding that is set up to actively search for any criminal activity. Ultimately, whether flag state or master consent applies in a particular situation depends on the position of the flag State of the vessel and on what level or detail the flag State has authorized to the master in domestic law to act on behalf of the flag State.[459] Current practice in maritime security operations seems also to be moving into the direction that master consent boardings of the kind that merely allows to engage with the maritime community is a more and more an accepted *modus operandi*.

7.3. Stateless vessels

One particular issue to note with regard to flag state jurisdiction over vessels in the context of consent is statelessness. In general, consent presupposes the existence of a State that can exercise its jurisdiction over a vessel and can give its consent to board a vessel. If a vessel is considered to be stateless, there will be no State that can be requested for permission. Statelessness as a legal basis to board a vessel does not flow from the inability to obtain consent from a State. Rather, the fact that a vessel is stateless by itself provides a legal basis for warships to visit the vessel.[460] A

[458] Arguably, when a boarding team that encounters something illegal during an AAV, they would have to obtain consent from the flag State, if it decides that it wants to take action.
[459] Papastavridis (2013), 65.
[460] See Article 92 sub 2 and Article 110 sub 1 under (d) UNCLOS.

stateless vessel is considered to be without nationality. This is codified in UNCLOS,[461] and arguably also a rule of customary law.

Boarding stateless vessels by means of warships is in fact not a rare activity. It is a much discussed topic in drug interdiction operations, for instance in the Caribbean region. France also used statelessness it as an argument in the *Medvedyev*-case. But also in the realm of international peace and security, since 9/11, the use of statelessness as a legal basis has spread in the effort of enhancing maritime security. Spanish forces operating within the context of operation *Enduring Freedom* in the search for Al Qaida and the Taliban members at sea, boarded the *So San* after concluding that the vessel could be considered as stateless. In March 2014, US Navy Seals boarded and stopped the *Morning Glory* from trying to sell crude oil coming from a Libyan port, as the vessel was a Libyan rebel held vessel that was said to be stateless after it was stolen by Libyan individuals upon which North Korea deregistered the vessel.[462]

7.3.1. Conditions for statelessness as legal basis

In order for statelessness to be a proper legal basis, the commander of the visiting warship must have *reasonable suspicion* that the vessel is stateless. A vessel is determined to be stateless under three different circumstances: if the vessels shows a flag but is suspected of flying a false flag, or shows more than one flag[463], when the vessel does not fly a flag at all, and thirdly, if it cannot be allocated to a State. Article 110 UNCLOS provides that under these circumstances a warship can board a stateless vessel. In terms of process, Meyer states that the visiting State first has a duty to try to verify the nationality of the vessel without boarding the vessel. Basically Meyer sums up three conditions that justify boarding the vessel: 1) The determination of reasonable suspicion that the vessel is indeed without nationality, 2) there are no other means available to verify its registration and, 3) that there is no ´reasonable excuse´, why the vessel is trying to conceal its nationality.[464] Meyers' view therefore underlines that

[461] See Article 110 UNCLOS.
[462] 'U.S. Navy hands over North Korean-flagged oil tanker Morning Glory to Libya after seizing it from rebels in dramatic raid', in *Daily Mail*, 22 March 2014. At: http://www.dailymail.co.uk/news/article-2586995/U-S-Navy-hands-North-Korean-flagged-oil-tanker-Morning-Glory-Libya-seizing-rebels-dramatic-raid.html.
[463] See also Article 92(2) UNCLOS.
[464] Oppenheim writes on the manner in which flag verification is demonstrated:

even though a legal basis may exist, some reticence must still be observed to board the vessel.

With regard to Meyer's second condition, one can argue whether the duty must not solely be on the commander of the warship, but also on the State of the warship. In other words, must a State do all which is feasible under the circumstances at the time to find out what the nationality of a vessel is, or is the local situation *at sea* and the communication between commander and the vessel enough for determining that there is a reasonable suspicion that the vessel is stateless? The ECtHR in the Medvedyev case seems to point in the direction that it is not only a commander's duty, but when possible also a State's duty. The ECtHR judged the fact that the *Winner* at sea did not show the flag and kept resisting the boarding not sufficient to consider the vessel as stateless against the background that the French authorities at that stage already knew it was a Cambodian flagged vessel.[465] As such, the ECtHR seems to look upon the issue that it is not solely the information that is physically verifiable at sea but also includes other information within the government that may be available to the commander. In the case of the *So San* that occurred in December 2002, according to Doolin, the decision to board the vessel came about based on three suspicions.[466] First, the vessel zigzagged, that vessels ordinarily would not do; the crew of So *San* raised and lowered the North Korean flag; third and most importantly the name *So San* was freshly painted on the stern while no name was registered under that name in North Korea. According to Roach after being queried, the master of the vessel replied that it was registered in Cambodia. The Cambodian authorities appeared to have confirmed that a vessel meeting the description was registered in Cambodia, but under the name of "*Pan Hope*" instead of *So San*. On the basis of the inconsistencies the vessel was boarded on the grounds of statelessness.[467] What the authority of the boarding team is once the vessel is boarded, is the real subject of debate. Unclarity exists on the ju-

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> A man-of-war which meets a suspicious merchantman not showing her colours and wishes to verify the same, hoists its own flag and fires a blank cartridge. This is the signal for the other to hoist her flag in reply….if the suspicious vessel, in spite of this warning [warning shot across the bow] still declines to hoist her flag, the suspicion becomes so grave that the man-of-war may compel her to bring to for the purpose of visiting her and thereby verifying her nationality.

[465] *Medvedyev*, para's 87-89.
[466] Doolin, 29-30.
[467] Roach, (2004).

risdiction that can be exercised over a stateless vessel. This subject will be touched upon in Chapter 9.[468]

7.4. Final remarks

Consent is generally accepted as a legal basis for MIO. The conditions for consent are clear, but the question when these conditions are met in the context of MIO raise certain issues, in particular with regard to the consenting authority. This debate centers on the question whether a State itself or the master of a foreign flagged vessel provides sufficient authority to board the vessel. Whereas the principle of master consent exists and the notion by itself is not debated, the scope of the master consent is. To what type of boarding can a master consent and what can the boardingteam do during a master consent boarding? These are questions that are basically the two sides of the same coin. Factors to be considered in these two questions are the position of the flag State of the vessel and to what purpose the boarding is taking place.

With regard to the latter, it is generally clear that no jurisdictional activities can take place during such boarding. As a result of these different views on how consent is applied in the maritime dimension States can take a both strict and more liberal approach. Either one takes the strictest position that only the flag State is authorized to board a vessel, whatever the purpose of the boarding is, or it allows certain activities. The contention is that there is a thin line between non-jurisdictional and jurisdictional actions. As a result of different views on this matter NATO in operation *Active Endeavour* has taken a cautious approach in which both master's and flag state consent is needed.[469] The matter is, however, unsettled in a more general sense, at least for the present until such time as an authorative ruling is issued or international agreement on this issue is reached.

[468] See Chapter 9, para 9.3.1.1.
[469] 'De strijd tegen het terrorisme in het Middellandse Zeegebied', in *NATO Review*, (Autumn 2005) www.nato.int/docu/review/2005/issue3/dutch/art4.html.

CHAPTER 8

International agreements

8. Introduction

States have the power to agree with other States to allow those States to intercept and board vessels under their jurisdiction on the high seas for certain specific activities. Obviously, international agreements are a form of consent, most commonly agreed between States. Treaties primarily aim to agree or set out the conditions between States in a more structural and permanent manner. The general advantage of international agreements over *ad hoc* consent, apart from the agreement being a more structural form, is that the provisions of the agreement itself upon which the interception takes place, provides more narrowly described authorities and also defines the scope of activities that may take place under the treaty-regime.

The contemporary focus on the use of international agreements as a legal basis for maritime interception operations is connected to the efforts to enhance maritime security. First, making use of international agreements fits the idea that maritime security is reached through cooperation on mutual security issues that States share.[470] This is a different idea than the classic naval power view in which naval power is used for competing with other States over command of sea. Second, international agreements have become more interesting where on the global level security interests cannot be sufficiently dealt with due to challenges of the involvement of the many States and their interests, States may still pursue their security interests on a more bilateral or regional level. To illustrate, the UN efforts on proliferation of WMD have until now not reached as far as providing non-consensual boarding authority to stop vessels suspected of carrying

[470] J. Kraska, 'Grasping the influence of law on sea power', in, *NWCR*, vol. 62, no. 3 (Summer 2009), 113-135.

WMD on the high seas. Instead, States try to achieve this through agreements on a bi- and multilateral level. As some States may find that the particular issue of WMD is not sufficiently addressed through either the UN-collective security system or the international law of the sea, international agreements are the tool that provides the legal basis in order to fill that gap. On the one hand, therefore, while global maritime security issues force States to cooperate with each other, on the other hand, because of the multitude of interests and factors involved these issues can develop slowly or in an unsatisfactory maner which can States to approach the issue from the bottom up with smaller bi-, regional- or multilateral level solutions.

International agreements with regard to maritime interception operations do not aim to take a step away from the basic ground rules of the law of the sea. Rather, one reason to enter into international agreements is that they make things work better or run more smoothly within the international system of States, which may be especially true for treaties that seek to enhance safety at sea. International agreements in this context try on a more operational level to overcome the hurdles that initially come with the fundamental principles of international law. They focus on mutual cooperation between States. Aspects like setting up procedures, intensifying coordination, points of contact, or obligations to criminalize acts under domestic laws all seek to strengthen maritime security, without in fact having to step away from fundamental principles derived from the sovereignty of States. It firstly operationalizes the issue of sovereignty versus mission accomplishment into workable details. And secondly it can subject any possible boardings to strict control measures.

Still, using the tool of the international agreement for maritime interception operations is not without criticism. The bilateral boarding agreements between the US and other States have brought some to argue against such treaties. For one reason because the procedural provisions set up in the agreements while not explicitly violating the basic principles of the law of the sea, do seem to nibble at those fundamental principles. As such, as the argument runs, an implied consent regime which is set up in these agreements is a procedure that may not seriously allow the requested State to exercise their sovereignty.[471] The fear may be that these proce-

[471] Klein, 313,

dures may be the start of something that ultimately can result in impairing the sovereignity and the equality of States.[472]

There are a number of international agreements on a wide range of topics that can form the basis for maritime interception operations. Examples of topics are drug-interdiction (1988 Vienna Convention),[473] criminal acts at sea (SUA-Convention and its protocols), piracy (UNCLOS), hostages (Hostages Convention 1979) and WMD (bilateral boarding agreements between the US and others). These treaties all fall within the realm of minimizing criminal acts at sea. As such, most of these fall outside the scope of this thesis. But because certain topics are now also related brought within the realm of restoring international peace and security, such as piracy, terrorists and proliferation of WMD, these topics will be touched upon in this chapter. Apart from the international agreements that are meant to work in a more global manner on specific thematic topics, also regional mutual cooperation arrangement are made between States to counter a maritime threats in specific areas. For instance, the cooperation treaty between the ASEAN[474] States laid down in the ASEAN Convention on counter-terrorism[475] and the so called *San Jose Treaty* on drug trafficking between a number of States in Caribbean hemisphere.[476]

8.1. The increasing role of international agreements in MIO

Although this part of the thesis focuses on the legal basis for MIO at sea, international agreements can play a role in the whole maritime interception process in the broadest sense, which extends further than to activities at sea alone. First, international agreements can play a role in the preconditions for successful MIO. This could for instance be setting up an intelligence gathering and sharing network between States and relevant organizations.[477] But this could also include authority to operate in certain geographical areas where naval operations are subject to authority of a State.

[472] Syrigos, 201.
[473] See article 17 of the Vienna Convention against illicit traffic in narcotic drugs and psychotropic substances (1988) .
[474] Association of Southeast Asian Nations, which includes 10 member states in South Asia.
[475] *ASEAN Convention on Counter Terrorism*, Cebu, 13 January 2007.
[476] Agreement concerning co-operation in suppressing illicit maritime and air trafficking in narcotic drugs and psychotropic substances in the Caribbean area, San Jose, 10 April 2003.
[477] N. Klein, 'Intelligence gathering and information sharing for maritime security purposes under international law ', in, N. Klein, J. Mossop, D.R. Rothwell, *Maritime security. International law and policy perspectives from Australia and New Zealand* (2010), 224-241.

A State can agree by international arrangement to allow foreign vessels to operate in its territorial sea. Another example of where international agreements can play a role in MIO is in international (shiprider) agreements to allow foreign shipriders[478] or law enforcement agents (LEDET's)[479] on board a warship. The purpose of shiprider-agreements is to provide a jurisdictional link between a suspect person and the State officials. It is a frequently used agreement in maritime drug interdiction[480] and has also been a subject of discussion in counter-piracy operations off the coast of Somalia. Whereas these examples focus on setting the conditions to ultimately enable a successful operation at sea, international agreements can also play a role in the aftermath of the interception. Some treaties set out provisions that codify the principle of *aut judicare aut dedere*, such as the SUA-Convention.[481] With regard to piracy, the UNCLOS provisions on piracy do not contain such a provision, but in recent counter-piracy operations off the coast of Somalia further agreements were made to transfer persons from one State to another. For instance, the EU concluded a transfer-agreement with Kenya on the conditions of transfer of suspected pirates.[482] Apart from the fact that such agreements lessen the logistical burden of out-of-area counter-piracy operations it also supports the political view that piracy should be prosecuted in the region rather than in the far off State of the intervening warship.

In terms of agreements that focus on the aftermath, also mention can be made of so called diversion port agreements that be concluded in order to agree with a State to have a port available where suspect vessels can be inspected, in a more thorough fashion as can be done at sea. Apart from the practical issues of inspecting at sea, the advantage of in port inspection is that it takes place within the jurisdiction of a State who can take more

[478] J. Voetelink, *Militair operationeel recht* (2013), 150. Shipriders should not be mistaken with vessel protection detachments (VPD's). The first are law enforcement agents who 'ride' on board a warship of another state through which specific authorities are provided which enables an arrest of a person at sea. VPD's are protection teams that protect a vessel from being boarded. These are frequently used in the context of piracy. See for the Dutch experiences M.D. Fink, J.E.D. Voetelink, 'De status van militaire Vessel Protection Detachments', in *MRT*, vol. 106 (2013), 41-53.
[479] Law Enforcement Detachment.
[480] See Van der Kruit, 274-294.
[481] Article 10 SUA-Convention.
[482] *Exchange of Letter between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such capture*, 25 March 2009.

appropriate measures against possible breaches of an UN-embargo. Although a diversion port agreement would very much take away much of the un-clarity as to what to do what suspected goods and persons encountered at sea, States seem to be reluctant to agree on authorizing one of its ports to function as a diversion port during military operations.[483]

Narrowing MIO again to operations at sea, a number of international agreements have specific provisions that deal with the right of visit by warships on foreign vessels on the high seas. The most obvious three treaties, used within the context of international peace and security, are the UNCLOS, *Treaty on Suppression of Unlawful acts at Sea against the Safety of Maritime Navigation,* 1988 (SUA-convention) and its 2005 Protocol, and lastly, the bilateral boarding agreements between the United States and other nations that are agreed against the background of the PSI. These agreements will be discussed below in the following paragraphs.

8.2. International agreements and the international law of the sea

Article 92 UNCLOS mentions that the convention itself (itself a treaty) or an international treaty may deviate from the fundamental principle of exclusive jurisdiction over a vessel by the flag State. As such, UNCLOS clearly opens the door for States to agree on treaties that may give enforcement jurisdiction to other States over a foreign flagged vessel. As Chapter 4 has set out, on the high seas the State has exclusive jurisdiction on board its flagged vessels. As mentioned there, Article 92 UNCLOS provides for the exception to the ground-rule in "exceptional cases expressly provided for in international treaties or in this Convention…". UNCLOS, therefore, opens the door specifically to consent through treaties. It does, however, not say anything on the use of consent within the meaning of precluding the wrongfulness of actions of a State. A strict reading of this article would lead to the conclusion that it does not consider consent through other forms of state consent, such as consent within the meaning an *ad hoc* agreement. As international agreements are 'form free' and may also exist in very rudimentary forms as long as it consists of the

[483] According to Pokrant Oman appeared to be reluctant to allow its ports being used as diversion ports. In the author's own experience during OUP, states that were asked to provide diversion were however also very reluctant to agree on a diversion port agreement.

will of an authorized body or person within both States, this still could fit the *ad hoc* agreement of consent. This seems also to be the line taken by the ECtHR in the *Medvedyev*-case.

There are only a few international agreements that have allowed third States to enforce jurisdiction over a flag Sate vessel without prior *ad hoc* permission in the context of international peace and security. The obvious one is UNCLOS itself, and next to UNCLOS one could mention the UN-Charter of which the collective security system provides for binding decisions for States and can take mandatory measures under Chapter VII to intercept third state vessels.[484] Interestingly, although an international agreement may give options to overcome the issue of exclusive jurisdiction, treaty-making practice in the maritime dimension has not jumped immediately in that direction. There are in fact no treaties that specifically step away from prior permission. Instead, against the background of trying to promote more instruments to minimize the threats of terrorists and WMD, solutions in recent treaties are sought primarily in shorter timelines and more efficient procedures to be able to obtain consent to board a foreign flagged vessel. As Hodgkinson *et al* conclude: "Boarding agreements save time".[485] As was mentioned in Chapter 2, the SUA-Protocol 2005 endeavored to enhance the use-ability of the SUA-Convention in light of the increased threats against maritime security. The main principle is enshrined in Article 8bis of the 2005 SUA-Protocol is still that: "The requesting Party shall not board the ship or take measures set out in subparagraph 5(b) without the express authorization of the flag State". Thus a prior request needs to be sent to the flag State. A minor procedural step away from this principle is however made in Article 8bis sub 5 under (d), which creates a "silent consent" procedure or a "presumption of consent"

[484] R.R. Churchill, 'UN Security Council resolutions and 1982 LOS convention', in *International Law Studies*, vol. 84 (NWC), 143-157, at 147. The possibilities the UN-Charter provides as a legal basis for maritime interception have already been discussed in Chapter four and will stay outside the scope of this chapter.
[485] Hodgkinson, 665.

when a State party does not react within four hours.[486] As Ashley Roach mentions; 'The boarding procedures do not change existing international maritime law or infringe upon the traditional principle of the freedom of navigation. Instead, the procedures eliminate the need to negotiate time consuming *ad hoc* boarding arrangements when facing the immediacy of ongoing criminal activity."[487]

The PSI is not a treaty and the interdiction principles by themselves do not give a legal basis for boarding foreign flagged vessels. The PSI does contain a political basis for subsequent treaty making between PSI-participants.[488] The bilateral ship-boarding agreements between the US and other States are based on this.

A construct of implicit authorization by the flag State is used in the ship-boarding agreements between the US and other States for the purpose of the PSI.[489] For example, the agreement between the US and Liberia has a time lapse limit of two hours before an authority to board is assumed.[490] The agreement between the US and Croatia appears to be an exception to this. Although there is a time limit of four hours, there are no consequenc-

[486] Article 8 bis, sub 5 (d) 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, London, 14 October 2005, IMO Doc. LEG/CONF.15/21, reads as follows: "Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence set forth in article 3, 3*bis*, 3*ter* or 3*quater* has been, is being or is about to be committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality".

[487] J. Ashley Roach, 'Global Conventions on piracy, ship hijacking, hostage taking and maritime terrorism', in R.C. Beckmann, J. Ashley Roach (eds.), *Piracy and international maritime crimes in ASEAN. Prospects for cooperation* (NUS center for international law, 2012), 38-61, at 50.

[488] The fourth principle states that:

> Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks…'

[489] Klein, *supra* note 19, p. 312. Shipboarding agreements have been agreed between the US and Antigua & Barbuda (2010); Nassau (2008), Belize (2005); Croatia (2007); Cyprus (2006); Liberia (2004); Malta (2007); Marshall Islands (2004); Mongolia (2008); Panama (2004); Saint Vincent and the Grenadines (2010).

[490] Article 3 (d) Agreement Between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea, Washington, 11 February 2004, http://www.state.gov/t/isn/trty/32403.htm, reads as follows: "If there is no response from the Competent Authority of the requested Party within two hours of its acknowledgment of receipt of the request, the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessels documents, questioning the persons on board, and searching the vessel to determine if it is engaged in proliferation by sea".

es when time has run out. Express authorization of the flag State is still needed.[491]

As such, both the 2005 SUA-Protocol and the ship-boarding agreements at least on paper appear to have effectively dealt with the fear that explicit flag state consent may take too long and this approach seems to be moving away from a hard-line view of the principle of flag State consent against the background of current security threats. Primarily because, as Garvey mentions: "Two hours is obviously a period of time grossly inadequate to assess the credibility of a request for interdiction and the interests involved. Under these bilaterals, if consent is not provided within two hours, interdiction can proceed by default".[492] Whether it is possible to obtain consent within four hours will probably depend on how the national institutions are organized to deal with the question when it arises.

8.3. UNCLOS

UNCLOS contains provisions in which within the international law of the sea it is allowed to interfere with foreign flagged vessels on the high seas. These provisions are laid down in Article 98, 110 and 111 UNCLOS.[493] Arguably, these provisions codify existing international customary law.

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[491] See Articles 4 (b) and (d) Agreement between the Government of the United States of America and the Government of the Republic of Croatia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials, Washington, 1 June 2005 (at :http://www.state.gov/t/isn/trty/47086.htm.). Article 4d of this agreements states:

> d. Except as otherwise permitted by international law, the requesting Party shall not board the vessel without the express written authorization of the Competent Authority of the requested Party.

[492] J.I. Garvey, 'The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative', Vol. 10 No. 2 *Journal of Conflict and Security Law* 2005, p. 133.

[493] Article 110 sub 1 UNCLOS reads:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

> (a) the ship is engaged in piracy;
> (b) the ship is engaged in the slave trade;
> (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
> (d) the ship is without nationality; or
> (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

These provisions contain six subjects altogether: rendering assistance, piracy, slave trade, unauthorized broadcasting, statelessness and hot pursuit. Articles 100-107 and 110 UNCLOS relate to the law of piracy. A lot has been written on the law of piracy laid down in UNCLOS since the multinational efforts of navies started to patrol the seas around the Horn of Africa supported by UN-resolutions. In this context however Article 105 and 110 are UNCLOS are of particular importance. Article 105 UNCLOS allows States to establish universal jurisdiction over piracy on the high seas, or any other place outside the jurisdiction[494] of any State. When properly authorized through national legislation, nations' warships can board a vessel suspected of piracy and arrest the persons and seize the property on board. Article 110 UNCLOS provides the authority to board a foreign flagged vessel, under the condition that there is a reasonable ground for suspecting that the vessel engaged in piracy.

Obviously, the piracy provisions in UNCLOS have been well used in recent years, but also, as mentioned in Chapter 5, the notion of statelessness is used as a reason to board a vessel within the context of enhancing maritime security.

Apart from the more traditional Articles of 110 and 111 UNCLOS, one could argue that in the interest of saving human lives in danger of the perils of the sea, Article 98 UNCLOS concerning the rendering of assistance implies also that under circumstances of distress, the boarding of a foreign flagged vessel is permissible. The situation of these distress circumstances allows (or rather: obliges) for immediate action taken by any mariner -man of war or merchantman- that can do so without serious danger to the (own) ship, crew or the passengers, rather than to wait for consent of a flag State of a vessel in distress. Rendering assistance in a maritime context has a specific and long developed context, is codified not only in UNCLOS but also in other maritime law treaties[495], and focuses on the safety of the vessel and persons of the dangers that exists from the per-

[494] Presumably this is Antarctica. Some have argued that maritime areas that belong to failed states would fall under this. Article 105 UNCLOS reads:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

[495] Such as the SOLAS-Convention and the Salvage Convention.

ils *from* the sea, for instance the lack of seaworthiness of a vessel drifting at sea. But it is, however, not meant to permit boarding when life threatening danger arises between for instance persons on board. Rendering assistance has, in other words, a strictly limited meaning and cannot be used in all circumstances of general danger at sea.

8.4. The SUA-Convention and Protocol

Instead, States have sought to take appropriate measures against criminal acts that occur on board a vessel via the SUA-Convention (1988), which came about as a result of the *Achillo Lauro* incident.[496] The Convention is supplemented by the SUA-Protocol (2005), which was ratified in 2010. The SUA-Protocol is not yet a generally ratified protocol.[497] The importance of the 2005 SUA-Protocol is that it adds four new offences to the SUA-Convention and includes a right of visit regime.[498] The offences are important for the proliferation of WMD because they make punishable an act of which its intention is to intimidate a population, or to compel a government or an international organization to do or to abstain from any act, by using NBC-material on or from the vessel. The provisions that allow for boarding a foreign flag vessel under SUA are Articles 8*bis* under 5 (c) and (d). With Article 8*bis* under 5 (c) (i) a flag State can authorize another State to board its vessel. With Article 8*bis* under 5 (d) a flag State can also opt for the four-hour rule regime, in which a requesting boarding State can board the vessel if there is no response from the flag State within four hours of acknowledgment of receipt of a request to confirm nationality. The visit-provisions are further analysed Chapter 9. Although the Protocol is, as Kraska and Pedrozo mention,[499] more robust than many other international agreements, it still takes the exclusive jurisdiction of the flag State over its vessels as the point of departure. Article 8*bis* under 5 (c) states that no party shall board the ship or take measures without the express authorization of the flag State.

[496] The Italian flagged *Achillo Lauro* was hijacked by Palestinians off the coast of Egypt, demanding the release of 50 Palestine prisoners. The hijackers were given safe passage in Egypt and were allowed to board an airplane to fly to Tunisia. US fighters then forced the plane to land in Italy. See D.L. Bryant, 'Historical and Legal Aspects of Maritime Security', in *University of San Francisco Maritime Law Journal*, vol. 1, no. 3-4 (2004), 1-27. A Cassese, *Terrorism, politics and law. The Achillo Lauro affair* (1989).

[497] The IMO-website states that as of February 2016, 35 states ratified the Protocol.

[498] Art. 4 under 5 SUA-Protocol.

[499] Kraska, Pedrozo, 835.

8.5. PSI bilateral boarding agreements between the US and others

The United States has entered into a number of bilateral agreements that concern ship-boarding for the purpose of stopping WMD. Kraska and Pedrozo mention that within the different agreements that exist (11 in 2014) three models exist for a legal ship-boarding action.[500] First is the situation where the US needs flag state consent under all circumstances. Second is the situation in which boarding is presumed to be authorized when a certain period of time has lapsed without response. And third is the situation where the boarding can take place if the registry of the vessel cannot be confirmed within a certain timeframe. There is not much available on the practical use of these BSA's. Only the *MV Light* incident can be connected to BSA's.[501] But apart from its actual use in practice, one can also see agreements as a mechanism to close the net on terrorists that try to use the maritime environment for their actions.

8.6. Conclusion

International agreements can form the legal basis for maritime interception operations. Where some treaties (UNCLOS and the UN-Charter) have provisions that ultimately allow States under certain circumstances to interfere with other vessels without prior permission of the flag State, another relevant treaties (SUA, bilateral ship-boarding agreements) have explicit regulations on boarding foreign flagged vessels, but do not reach as far as not needing prior permission. Rather, against the background of the need to act rapidly authority in treaties have move to implied authority, or silent procedures. The condition for the legal basis to come into play is the passage of time, after which consent is presumed to be given. Even so, this procedure is still based on the overall explicit authority given by a State through a treaty.

[500] Kraska and Pedrozo, 788.

[501] The Belize flagged vessel *M/V Light* from North-Korea on its way to Myanmar and suspected of carrying missile parts was forced to turn back by the US who dispatched the *USS McCampbell* to intercept the *M/V Light*. Although authority to board was given by Belize, based on the US-Belize shipboarding agreement the master refused. Instead it finally turned back to North Korea.

Introduction to Part III

The legal regimes of the law of armed conflict (LOAC) and international human rights law (IHRL) will be central in Part III. As mentioned in Chapter 1, a legal regime refers to the bodies of international law that regulate actions, in this case during interception operations. Part III will, therefore, move into the realm of actual military activities at sea. From an operational point of view, once the question is answered on which legal basis a maritime interception operation may take place, the next question will be which authorities exist during the interception of a foreign flagged vessel under which a warship's crew can conduct maritime interception operations. Part III will analyse the applicability of legal regimes through three specific activities that are of importance to maritime interception operations: the right of visit (Chapter 9), the use of force (Chapter 10) and detention at sea (Chapter 11).

Before embarking on the issue of legal regimes during maritime interception operations two preliminary and general remarks will be made. First, in recent years, the debate on the applicability of human rights to extraterritorial military operations has been on the centre stage in the theatre of international law and military operations. Although the debate has been very lively in the realm of land-operations, it has been less present in the maritime dimension. For one reason, because until recently naval operations have focused on stopping vessels and goods, rather than putting the individual on board as the central issue. To illustrate, when a vessel breaches a belligerent blockade the owner will run the risk of losing vessel, but it is not a punishable action for an individual. Also, to give another example, most the maritime embargo operations have focused on enforcing sanctions which dealt with prohibited items, such as military material or oil. Recent counter-piracy operations, and even more recently the current challenge of refugee flows at sea in the Mediterranean Sea, through practice and case law, has given rise to academic debate on the

scope of human rights law at sea.[502] As the ECHR aptly notes in the *Medvedyev* case:

> The special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.[503]

Activities during maritime interception operations must now not only be considered through the applicability of the law of armed conflict or the law of the sea, but also within the context of human rights law. As such, among other issues, it will attract similar discussion of the relationship between the applicability of legal regimes during maritime interception operations. With regard to the applicability of human rights law during MIO, Part III will primarily focus on human rights law from a European perspective and thus deal with human rights law through the *European Convention on Human Rights* (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR). The main reason for this is that this thesis is not be an in-depth study into the possible differences that may apply between the different human rights instruments, such as the ECHR and the *International Convention on Civil and Political Rights* (ICCPR). Second, as the Netherlands is bound by the ECHR and frequently operates with other European navies, the primary focus will, therefore, be on the ECHR.

The second general remark is on distinction. As in the land dimension, the maritime dimension during armed conflict obviously also distinguishes between combatants and civilians. The maritime dimension, however, than further divides civilian (or: merchant) vessels in enemy and neutral merchant vessels. The first are merchant vessels that fly the flag of the enemy State. The second are merchant vessels that fly the flag of a neutral State. Although both must be regarded as civilian, both categories of vessels are subject to a specialized subset of the law of armed conflict; the law of naval warfare. This subset of the laws of armed conflict, and the regulations regarding economic warfare and maritime neutrality in

[502] See e.g. E. Papastavridis 'European Convention on human rights and the law of the sea: the Strasbourg Court in unchartered waters', in M. Fitzmaurice, P. Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights : Legal and Practical Implications* (Leiden, Martinus Nijhoff publishers 2013), 117-146. (2013); Treves (2010).
[503] *Medvedyev*, paragraph 81.

particular, will have an effect on the manner in which way belligerent may ‘target’ their operations against merchant vessels.

PART III:

Legal regimes and maritime interception operations

CHAPTER 9

The right of visit

The belligerent right of visit is not a substantive and independent right, it is a means justified by the end.
-A.P. Higgins[504]

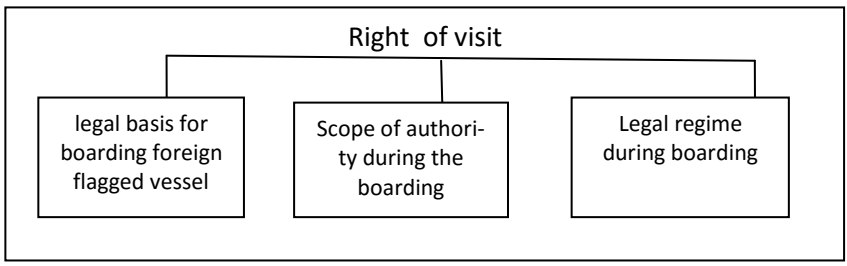
9. Introduction

The right of visit is of key importance to maritime interception operations. It is at the very heart of maritime interception. Traditionally, the right of visit is generally separated into peacetime right of visit and the right of visit during international armed conflict. With the first, the right of visit codified in Article 110 UNCLOS is meant. The latter refers to the belligerent right of visit and search,[505] which is part of the law of naval warfare. In line with the view that there are several legal bases for MIO, it is argued here that the right of visit has more applications than the traditional separation into peacetime and wartime rights and may include manifestations arising different legal bases. For example, a right of visit is now also accepted to exist through authorization by the UNSC, derived from *ad hoc* consent or based on international agreements.

The right of visit in this chapter is defined as the legal framework that regulates the authorities during the visit of a foreign flagged vessel by a

[504] A.P. Higgins, 'Visit Search and detention', *BYBIL*, no. 43 (1926), 43-53, at 43.
[505] Generally, the peacetime rights of visit are called " the right of visit", whereas the right to visit during international armed conflict appear under names as "the right of visit and search" or "the belligerent right of visit and search", or even more extensively "the belligerent right of visit, search and capture".

warship. In principle, the right of visit contains three aspects, which relate to both the legal basis and applicable legal regime: the legal basis to board, the authorities possessed during the visit, and the legal regimes that apply during the execution of the visit. To illustrate, if a boarding is based on an international agreement, the agreement itself is the legal basis which will also detail the scope of the authorities that can be conducted during the boarding. Added to this detailed scope, the manner in which way force is used or persons are detained will depend on constraint that are in place during the boarding, which are, among other factors, based upon the applicable legal regime. These three aspects together make up the complete scope of authority that a boarding team has during the boarding of a vessel. Separating these aspects of a visit is helpful to understand that within all the legal bases for MIO, all three aspects need to be considered. This is relatively easy for existing rights of visit, or for visits that are derived from an international agreement. But for visits during a MIO that do not have a pre-existing framework that addresses the scope of authority during the visit, this is less clear. For example, when an *ad hoc* consent is the legal basis for the boarding, the scope of consent given should also detail the scope of authority for the boarding. The additional legal regimes that apply depend on the factual situation, which can be either IRHL or LOAC. In the same manner, a UN-resolution can be the legal basis for the boarding, which details some of the scope of authority for the boarding itself. The manner in which such authority is enforced depends rather on the applicable legal regime. The above mentioned definition of the right of visit used in his chapter excludes the legal basis element, which has already been discussed in Part 2. This chapter will focus on the second aspect; the scope of authority, or in other words, the rights *during* the visit. The third aspect of the visit, the applicable legal regime, is studied in Chapters 10 and 11. This chapter will first start with two brief and general remarks on the right of visit during maritime interception operations and then proceed into an analysis of the different manifestations of the right of visit.



9.1. Three general remarks on the right of visit during naval operations

Before embarking on the different legal frameworks for the right of visit, it is important to underline two general notions of the use of the right of visit during naval operations. First, although the different manifestations of the right of visit during naval operations are alternative and separate to each other, they may well be carried out simultaneously in one military campaign. As pointed out in Chapter 2, during one military operation warship commanders can be authorized to act based on different types of right of visit. For example, a warship that takes part in an international armed conflict, will have the authority to exercise the belligerent right of visit and search, but can at the same time also be authorized to act against piracy[506] or a SUA-offence.[507] This was the case during the Netherlands contribution to *CTF 150*, in which Netherlands warships assigned to the operation had both the authority to use the belligerent right of visit against possible terrorists at sea, and the authority to act against piracy off the coast of Somalia, based on the UNCLOS right of visit. The maritime operating area of TF 150 was both an area of interest for terrorists and at the same time was being used on a regular basis for activities relating to pirates. To mention one other example, the fact that a warship is, for instance, assigned to a multinational UN-mandated maritime embargo operation does not preclude that it may also be authorized to board vessels that

[506] Ministerie van Defensie, *Eindevaluatie CTF 150*, 18 September 2006.
[507] Interestingly, Article 2*bis* sub 2 of the SUA-Protocol mentions that the Convention does not apply to the activities of armed forces during an armed conflict, but does not exclude that the convention applies also during armed conflict.

are stateless or suspected of piracy. It may, however, have impact on the command and control of contributing warships. Where an international commander can order a visit in line with the mandate, other authorities stay, in principle, with the warships' State, unless it has delegated its authority to an international commander.

Second, from a geographical perspective, different manifestations of the right of visit can exist simultaneously within one area of operations. During the US/UK naval operations in the Persian Gulf in March 2003 against Iraq (OIF) in which the belligerent right of visit and search applied, the UNSC-based right of visit to enforce the maritime embargo against Iraq still existed in the area of the Persian Gulf.[508] Moreover, these rights can be applied in the same area *and* conducted by warships of the same State, if the State has assigned ships to both operations.[509] As this chapter will show, there are significant differences between these different manifestations of the right of visit. It is, therefore, important for a warship commander to know which right of visit applies to a particular situation, even though the execution of the right from an operational perspective may be quite similar. The rules of engagement for the operation may provide some assistance in this regard, but it will not always be the case.

Third, it must be underlined that the quote by A.P. Higgins in the heading of this chapter signals an important point with regard to the nature of the right of visit. The activity of visiting a foreign flagged vessel by a warship is not an *end* to itself, but a *means* that serves another specific purpose. The right exists to enable States by means of a visit of another vessel to verify and, if needed, subsequently stop an illicit activity, a breach of a UN-resolution, or exercise an authority under the law of naval warfare. It is not a right that is meant for the sole purpose to gain access to a foreign flagged vessel, after which a range of new opportunities may, however practically, arise from the fact that a State is physically on board the vessel. The right of visit is a means to support something else, which must be sufficiently concrete so that lawful access to a vessel cannot be

[508] See also, R. McLaughlin, 'United Nations Security Council Practice in relation to the use of force in no-fly zones and maritime exclusion zones', M. Weller (ed.) *The Oxford Handbook on the international law on the use of force* (2015), 251-271, at 267-268.

[509] In this context McLaughlin refers to an interesting situation during the 2003 operations against Iraq, in which the belligerent visit and search does not allow a warship to visit a vessel that comes from the enemy state, (based on the fact that contraband needs to have an enemy destination) and where the coexisting resolution does provide the authority to stop merchant vessels for inspection of prohibited goods. McLaughlin (2015), 267.

used for other purposes. In this regard, the right of visit cannot be separated from the reason why a visit is undertaken and its lawfulness will also depend on this reason. To illustrate the operational challenge this comment raises, I will sketch the following dilemma:

> During an international armed conflict a neutral vessel suspected of carrying contraband to the enemy is sailing from (not to) enemy territory to a neutral destination. The latter information bars a commander from using the right of visit based on the law of naval warfare, as this authority is limited by a suspicion of carrying contraband and (ultimate) enemy destination of the vessel. The commander has, however, noticed that the vessel does not fly a flag and therefore views the vessel to be stateless, which allows him, based on the peacetime right of visit, to board the vessel. Whilst checking for nationality on board the vessel, his suspicion of the vessel carrying contraband appeared to be correct. But because the lawful capture of contraband still depends on the condition of destination, it means that in this case, although access to the vessel was gained lawfully, it is still not lawful to seize the goods.[510]

9.2. Ad hoc-consent based right of visit

As Chapter 7 has noted, consent between States is a legal basis for visiting a foreign flagged vessel. The scope of this type of visit must usually be sought within the realm of law enforcement, for instance for the purpose of stopping illicit activities on board a foreign flagged vessels. When authority to board is given through consent this does not, however, also automatically makes clear the scope and authority of the visit without further specifications; there is no specific legal framework that automatically comes into play when *ad hoc* consent to board the vessel is given by a State. Important to note is that a legal basis to board based on *ad hoc* consent does not automatically include the authority to perform jurisdictional enforcement. As Gill mentions; 'The intervention will be subject to any conditions posed by the consenting State'.[511] Through consent a State can waiver the exclusive enforcement jurisdiction, but only to the extent the waiver permits. As Kraska notes: 'Permission to board may be narrowly circumscribed, however, and does not necessarily entail consent to in-

[510] Albeit not a strict legal answer, an operational decision is imaginative where the goods are still captured and where the capture will ultimately not be considered as a lawful prize in a prize court, which may lead to compensation. Be that as it may, within the operational arena the action is successfully frustrated.

[511] T.D. Gill, 'Military intervention at the invitation of the government', in T.D. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 229-234.

spect, search or seize the vessel'.[512] The purpose and the range of the enforcement measures during the visit, therefore, depend on what is agreed between the States, which, as a guideline, must also be sufficiently concrete. The latter point has also been illustrated in the *Medvedyev*-case. The Cambodian diplomatic note of consent included the authority to intercept, inspect and take legal action against the *Winner*.[513] The ECtHR accepted the diplomatic note as the legal basis but opined, however, that the fate of the crew was not sufficiently covered by the note and therefore did not establish that the deprivation of liberty the crew was subject to an agreement between France and Cambodia.[514] The enforcement jurisdiction of France to arrest and detain the persons on board the vessel was not considered to be granted by the Cambodian authorities. In this case, the legal certainty that had to arise from the note also emerged from human rights standards on deprivation of liberty, which will be elaborated upon in Chapter 11. At this point it is enough to conclude that in general the conditions of consent must be made sufficiently clear to ensure clarity on the scope of authority applicable to the boarding.

Based on Article 92 UNCLOS the flag State will have exclusive jurisdiction over the vessel. The boarding State might also have jurisdiction when for instance the persons who are either the suspected criminal or the victims of the crime on board have the same nationality as the boarding State, through the (passive) nationality principle, or that a State has granted universal jurisdiction on a crime through its domestic laws. In other words, situations of concurrent jurisdiction can exist. As the flag State has exclusive jurisdiction over the vessel, primary jurisdiction is with the flag State, unless the waiver of consent allows the boarding State to enforce its own jurisdiction. The consenting State can therefore choose to either allow the boarding State to enforce jurisdiction on behalf of the flag State, or decide to waive its primary enforcement jurisdiction in favour of enforcement jurisdiction of the boarding State. The first situation is the situation that is foreseen also, albeit agreed in an international agreement, in the SUA-Protocol boarding provisions and the bilateral ship-boarding agreements between the US and other States. It is, furthermore, unlikely that a State will give consent to a boarding of one of its flagged vessels

[512] Kraska, 'Broken taillight' (2010), 11.
[513] *Medvedyev*, paragraph 10.
[514] *Medvedyev*, paragraph 98-99.

without any reasons given by the requesting boarding State. The boarding State will have to make clear to the flag State that there are grounds for suspicion that a certain criminal or prohibited act is taking place on board against which actions must be taken. It would seem logical therefore that the threshold to board the vessel will be that there must a reasonable ground for suspicion that the vessel is engaged in something illicit.

9.3. International agreements and the right of visit

Chapter 8 has noted first that a legal basis for MIO exists when States agree to conclude international agreement between them on this subject. When the visit finds its legal basis in an international agreement, the scope of the visit is detailed in the agreement itself. It will detail the purpose and what authorities exist for the visiting State during the boarding. In the following paragraphs the UNCLOS, the SUA-provisions and the bilateral boarding agreements between the US and others States will be touched upon as illustrative examples of such agreements.

9.3.1. The limited character of the UNCLOS peace time rights of visit

Primarily,[515] Article 110 UNCLOS deals with the peacetime right of visit on the high seas, which has been subject to much analysis, especially after piracy off the coast of Somalia became a much debated issue. The purpose of the right of visit is limited to piracy, slave trade, stateless vessels and unauthorized broadcasting. It is explicitly stated that warships may exercise this right. Klein notes on this right is; 'The fact that these exceptions are narrowly construed reflects that the preference of States still accords with the overarching construct of *mare liberum'*.[516] The right of visit under UNCLOS follows both the notion that the right of visit must be considered as an exception to the exclusive jurisdiction of a flag State, and the notion that States do not have general policing rights on the high seas. Apart from the fact that Article 110 UNCLOS characterizes these rights as

[515] Other peace time rights of visit may be found in article 111 UNCLOS, which regulates hot pursuit. Arguably also article 98 implies a right of visit to secure the safety of persons in distress at sea. Also, outside the realm of international peace and security, more implicit rights of visit exist, for example, a right of visit that is implied in other authorities in which a state asserts their rights in the different maritime zones. The practical side to conduct the authorities given under article 33 UNCLOS in the contiguous zone implies such a right for certain specific purposes.
[516] Klein (2005), 302.

acts of interference, the exceptional character of this right is in general manifested in a number of specific limitations.

First, it explicitly puts up the threshold of 'reasonable grounds to suspect' for the application of the right.[517] The information of the suspicion itself may either come from the commander of the visiting warship itself via on the spot verification at sea, or via other channels, such as received intelligence. To underline this threshold UNCLOS also States that boardings that are based on suspicion that later appeared to be unfounded shall be compensated for any loss of damage.[518] Obviously, this signifies that losses or damages which result from a boarding that is undertaken without any suspicion at all, must also be compensated. All in all, as Wendel states: 'Object and purpose of Art. 110 para. 3 LOSC is to prevent abusive interference and to increase the degree of diligence exercised by the naval officers considering a boarding.'[519]

Second, as mentioned previously, the purpose of the visit it is limited to certain types of situations, namely in the cases of piracy, slave trade, stateless vessels and unauthorized broadcasting. The purpose for these manifestations of the right of visit are, in other words, well defined. It does not leave room to apply the right of visit to, for instance, drug-trafficking or suspected terrorist boarding operations.

Third, the authorities are limited to visit and search only, and do not expressly possess authority to attain seizures, or exercise enforcement jurisdiction. This authority still lies with the flag State.[520] Article 110 UNCLOS only allows to board for the purpose of determining whether one of the four situations are indeed ongoing. The article does not mention what happens after the moment the warship's crew has found that its suspicion was right. This indicates also that the right of visit is very limited in the sense that well founded suspicion and which after inspection seems correct still does not give any further authorities for the boarding warship to

[517] Article110 UNCLOS (excerpt) reads:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

[518] Art. 110 sub 3 UNCLOS reads:

> 3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained

[519] Wendel, 113.

[520] Guilfoyle, *Shipping interdiction*, 78. Papastavridis (2013), 80.

act against it and the persons on board. The one exception to this is piracy. Article 105 UNCLOS[521] states explicitly that enforcement jurisdiction exists for other States over vessels that are suspected of piracy. As such, Article 105 provides that piracy is a crime over which every State has (universal) jurisdiction. In order to effect this possibility, domestic legislation must, however, also be in place.[522] Whereas some authors, such as Guilfoyle and Papastavridis adhere to the strict approach of authorities based on Article 110, Von Heinegg takes a step further and states that also for the other rights in Article 110 that, based on the precedent of the piracy articles, 'There are good reasons to assume that those measures may also be taken against a vessel if the suspicions that they are engaged in any of the other activities prove to be well founded'.[523] His view appears to ensure, for instance in the case of statelessness of a vessel, that enforcement jurisdiction is ensured.

Fourth, the geographical limitation of Article 110 UNCLOS is the high seas. Via Article 87 UNCLOS, the Article 110 authority also applies in the EEZ. For operational purposes during military operations the limits given to warships for conducting these authorities can be further limited to a specific operational area. It does not mean, however, that outside that operational area acting against for instance piracy becomes unlawful, but it does mean that a commander will act outside his given military orders. To illustrate this in an international setting, the EUNAVFOR counter-piracy operation *Atalanta* has limited its operational area to up to 500nm from the Somali coast, which was expanded in 2009 to the Seychelles.[524] If a State wishes to capture and prosecute pirates outside the EU-

[521] Art. 105 UNCLOS reads:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

[522] The Netherlands Criminal Code has made piracy (zeeroof) punishable under Articles 381-385. The Netherlands Criminal Procedural Code in article 359d opens the possibility that commanders of Netherlands warships are authorized to act against piracy. See on the Dutch criminal code on piracy (in Dutch); M.D. Fink, 'Zeeroof', in *MRT* (2006), 225-233.

[523] Heintschel von Heinegg, (2010), 389.

[524] Art. 1 of the EU Council Joint Action 2008/851/CFSP states:

> 2. The forces deployed to that end shall operate, up to 500 nautical miles off the Somali coast and neighbouring countries, in accordance with the political objective of an EU maritime operation, as defined in the crisis management concept approved by the Council on 5 August 2008.

operational area, it would have to do it outside the EU-ROE, on national ROE.

9.3.1.1. Statelessness

The jurisdictional consequence of a stateless vessel with regard to the exercise of jurisdiction by other States is not entirely clear in international law. Most authors take the view that the fact that a vessel is without nationality does not breach international law. The notion of statelessness of vessels on the high seas, however, does not sit well with the basic concepts of the international law of the sea. Statelessness goes against the public order of the oceans because no State can exert jurisdiction and take responsibility over such vessels. It is also not an automatism that a stateless vessel is subject to the universal jurisdiction of all States. UNCLOS in this respect goes as far as a right to board and identify a stateless vessel, but does not mention what to do next, if indeed no State can be attached to the vessel. Obviously, jurisdiction on board can be established on other points than only the flag of the vessel, for instance be focusing on the persons and establish jurisdiction based on the nationality principle, or domestic laws that make a certain crime extraterritorially punishable. Even though this still does not solve the issue of (the lack of) jurisdiction on the vessel itself, the fact is that the chances that a State will object to actions against a stateless vessel are less probable. One school of thought based on this notion is as Den Heijer mentions:

> '…the school of thought that ships without a nationality do not enjoy the protection of any State and that, in the absence of competing claims of State sovereignty, any State can apply its domestic laws to a stateless vessel and to that purpose proceed with the boarding, searching and seizure of that vessel.'[525]

A balance, therefore, ought to be struck based on the specific circumstances of the case between the totally unwanted consequence of statelessness in which stateless vessels become effectively immune because no one can exert jurisdiction, and automatically applying the boarding State's jurisdiction as a standard consequence of statelessness.

[525] M. Den Heijer, *Europe and extraterritorial asylum* (2011), 236

Apart from the issue whether statelessness implies that the boarding State can assert jurisdiction over a vessel,[526] another point to note is the purpose behind the authority to board under circumstances of statelessness. Interestingly, in both *Medvedyev* and *So San* the ultimate aim of the boarding of both vessels was not to check whether or not the vessel was in fact stateless, but to stop something else from happening; a criminal act and a weapons delivery. One cannot escape the feeling that the legal framework of statelessness is not used in the scope for what this framework has been set-up to do, namely a very restrictive authority to check the nationality of the vessel. In a restrictive approach, the consequence of statelessness can be that the vessel and crew detained in order to further determine who is responsible over the vessel. If the crew is suspected of any criminal acts it would fall to the scope of checking nationality but should be referred to the State once it is established which State has responsibility over the vessel or otherwise via the nationality of the crew. Statelessness should, however, not be used to gain access on board a vessel for the purpose of other actions that may not be allowed, but for which there is no legal ground to board at hand.

9.3.2. The SUA-provisions

The SUA-provisions are quite detailed regarding the scope of authority during the visit. The purpose of the visit within the SUA-framework is to act against the offences stated in Article 3 SUA-Convention and Article 4 sub 5 SUA-Protocol. The latter article has been added to make punishable acts by *any* person from or with a ship (the ship used as a weapon) which also involves WMD.[527] Article 5 of the SUA-Protocol requires States to

[526] Guilfoyle notes that this issue remains unclear. He concludes that some states, including the US, take the approach that jurisdiction may be asserted over a stateless vessel, which is a practice that, as he states, is unprotested. Guilfoyle (2009), 341-342.

[527] In art. 4 sub 5 article 3bis is added, which reads:
Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
(a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:
(i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or
(ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
(iii) uses a ship in a manner that causes death or serious injury or damage; or

make these SUA-offences punishable under their domestic laws and Article *3quater* mentions *any* person, the State who acts on the basis of the SUA-Convention will have enforcement jurisdiction on the basis of their domestic laws. Also, the SUA-framework requires reasonable suspicion to be able to exercise the right, which is codified in Article 8*bis* sub 4 of the SUA-Protocol. Article 8*bis* sub 5 of the SUA-Protocol allows a State to take appropriate measures with regard to that ship which may include the stopping, boarding and searching the ship, its cargo and persons on board and questioning the persons on board, *only* in order to determine if an offence is being is about to be committed. Article 8*bis* sub 5 therefore merely authorizes another State to determine whether a SUA-offence has taken place, but does not authorize primary enforcement jurisdiction. In this respect, the article follows the same construct of Article 110 UNCLOS. When an offence has indeed taken place, with regard to jurisdiction over the offenses Article 8*bis* sub 6 to 8 of the Protocol are of importance. Once it is found that such an offence as indeed taken place, sub 6 then goes on to state that the flag State may authorize the requesting party to detain the ship, cargo and persons pending receipt of disposition instructions from the flag State. Sub 8 underlines that the flag State has primary jurisdiction, but can waive its jurisdiction to allow for taking measures by another State. In summary, in the SUA-framework the flag State stays in charge of the issue, but has through the means of an international agreement quickened the process for boarding to consent to boarding under specific circumstances.

(iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i), (ii) or (iii); or

(b) transports on board a ship:

(i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or

(ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or

(iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or

(iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

The geographical limitation of the SUA-right of visit is connected with Article 4 of the SUA convention, which is not very easily understandable in just one read-through. Paragraph one reads: This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States. The article suggests that it not only applies in the maritime zones outside the territorial sea but also applies to vessels that are within the territorial sea of another State and are scheduled to navigate into other maritime zones.

9.3.3.Bilateral ship-boarding agreements between US and other States

As Chapter 3 has noted, bilateral shipboarding agreements (BSA) between the US and other States are pursued in the context of PSI and SC-Res. 1540 (2004). Its scope, therefore, is related to the suppression of activities related to WMD, and its purpose is to engage in operational agreements that authorize boarding of foreign flagged vessels to interdict WMD-cargo in order to disrupt the trafficking of WMD.[528] So far, as of 2015, the US has concluded agreements with 11 different States.[529] That does not seem much, but it is argued by the US that these eleven States account for 60 percent of the world's tonnage. The authorities under which a boarding can take place differ per agreement. As mentioned in Chapter 8 Kraska and Pedrozo State that the BSA's make use of three different models with regard to the authorization to board the vessel.[530] First is that the State will have to give consent. Second is that consent is presumed to have been given, when there is no reaction of the flag State within a certain period after the request. And third is the model that boarding authority is presumed within a certain period of time only if the State cannot confirm the registry of the vessel. The BSA's list a number of conditions that forges the right during the visit in these circumstances. Firstly, boarding is only allowed outside the territorial sea of any State. Secondly, the threshold of reasonable grounds is introduced. There must be a reasonable ground to suspect that the vessel is engaged in illicit trafficking of WMD. The

[528] Kraska & Pedrozo, 785-787.
[529] Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, Panama,
St. Vincent and the Grenadines. See www.state.gov/t/isn/c27733.htm. All the BSA's have also been published on this website.
[530] Kraska & Pedrozo, 788.

BSA's mention in Article 1 (definitions) that: "Suspect vessel" means a vessel used for commercial or private purposes in respect of which there are reasonable grounds to suspect it is engaged in proliferation by sea. Third, the BSA's also consider the jurisdiction over detained vessel, cargo, other items or persons on board the vessel. The principle is that primary jurisdiction remains with the flag State and the boarding party effectively operates on behalf of the flag State. It is for the flag State, therefore, to decide how to proceed once action has been taken.

9.4. Self-defence and the right of visit

Chapter 7 has noted two approaches of how self-defence is argued as a legal basis for MIO. First, the traditional approach in which the use of force in self-defence triggers the situation of an armed conflict, to which the law of armed conflict applies. And second, the approach in which self-defence is argued as a legal basis to stop vessels that carry WMD or terrorists. The following paragraphs will first go into the right of visit regulated by the law of armed conflict, the law of naval warfare in particular. It will then place some remarks in the context of the second use of self-defence, a so called 'self-defence' or 'NIAC-right of visit'.

9.4.1. The belligerent right of visit and search

The law of naval warfare consists of a number of specialized rules that apply during international armed conflict. These specialized rules contain rules on issues such as blockades, contraband, hospital ships and the protection of wounded and shipwrecked at sea and includes the law of maritime neutrality. The law of naval warfare also provides for the belligerent right of visit and search. There is no modern treaty[531] that explicitly codifies this right, although it is implied in some provisions of the law of naval warfare.[532] The belligerent right of visit and search is, however, a

[531] It is mentioned, however, in historical treaties. Heintschel von Heinegg mentions a few of those in his Article 'Visit, search and capture – conditions for applicability', W. Heintschel von Heinegg (ed.), *Reports and Commentaries of the Round-Table of experts on international humanitarian law applicable of armed conflicts at sea. Buchumer Schriften zur Friedessicherung und zum Humanitarischen Volkerrecht*, 24 (1995), 1-92.

[532] In, for instance, provisions of the (albeit unratified) London Declaration of 1909, the Hague Convention (XI) relative to certain restriction with regard to the exercise of the right of capture in naval war of 1907 and the Paris Declaration of 1856, there is mentions of capture, rather than explicitly

longstanding and accepted right of States during international armed conflict. Pyke, in his treatise on the law of contraband in 1915 states that: 'The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation'…the right is equally clear in practice, for practice is uniform and universal upon the subject'.[533] Also Colombos mentions that the belligerent right of visit is uncontested.[534] The practice in the 1980-1988 Iran-Iraq war, as Gioia and Ronzitti mention; 'has clearly demonstrated that belligerents still enjoy the right to visit and search neutral merchant vessels in order to ascertain whether they are carrying contraband of war'.[535] During the Iraq War of 2003, US naval forces operated under the law of naval warfare and relied upon the belligerent right of visit and search.[536] Point 3 of *Special Warning no. 121* for the Persian Gulf promulgated by the US on 20 March 2003 also used wording that indicates such a use[537]:

> 3. Vessels operating in the Middle East, Eastern Mediterranean Sea, Red Sea, Gulf of Oman, Arabian Sea, and Arabian Gulf are subject to query, being stopped, boarded and searched by US/Coalition warships operating in support of operations against Iraq. Vessels found to be carrying contraband bound for Iraq or carrying and/or laying naval mines are subject to detention, seizure and destruction. This notice is effective immediately and will remain in effect until further notice.[538]

In short, the belligerent right of visit and search is a longstanding right and has certainly not become an obsolete means to exercise maritime interception operations. With regard to the scope and purpose of the belligerent right of visit and search, a number of remarks can be made.

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expressing that there is a belligerent right of visit and search. Article 63 of the London Declaration (resistance to search) specifically mentions search.

[533] H.R. Pyke, *The law of contraband of war* (1915), 196-197.

[534] C.J. Colombos, *The international law of the sea* (5th edition, Longmans, 1962), 712.

[535] A. Gioia, N. Ronzitti, 'The law of neutrality: Third states' commercial rights and duties', in I.F. Dekker, H.H.G. Post, *The Gulf War of 1980-1988* (1992), 221-242, at 232.

[536] It appears also that the US Coast Guard vessels during OIF have made use of the right. See B. Tripsas, P. Roth, R. Fye, *Coast Guard Operations during Operation Iraqi Freedom* (Center for Naval Analyis, 2004).

[537] Special warnings are warnings issued by the US to alert the maritime community of risks for maritime shipping in maritime zones. It can also contain information on what to expect when a merchant vessel is entering an operational area.

[538] *Special Warning no. 121 Persian Gulf* is printed in Kraska & Pedrozo, at 95.

First, the belligerent right of visit and search is a procedural right to enforce the law of contraband and un-neutral service and is primarily applicable to neutral merchant vessels.[539] Arguably, this right also exists in relation to enemy merchant vessels and against all vessels that are breaching a blockade. The position that enemy merchant vessels and blockade-runners can be captured implies inevitably that as matter of practical circumstances, they can also be visited, although they don't need to be searched.[540] The same point of view is taken in the *San Remo Manual*, that in its basic rule 118 on the right of visit and search does not distinguish between neutral and enemy merchant vessels, and adds in the commentary that its drafters did not hesitate to acknowledge the right to 'visit and search all merchant vessels, be they enemy or neutral'.[541] First, to be able to effectively enforce a blockade. As such, one could opine that two different types of belligerent rights of visit can be distinguished. The first is explicit and against neutral merchant vessels for the purpose of finding contraband or to determine whether a vessel is engaged in un-neutral services. The second is implied in the fact that enemy merchant vessels and blockade runners can be captured, which implies that a visit may be necessary to take control over the vessel.

Second, the belligerent right of visit and search is a right for belligerent warships only and is only applicable in international armed conflicts. With regard to the latter point, it is still the general consensus that the law of naval warfare is only applicable in interstate conflicts.[542] Interestingly, this legal point of departure immediately puts a stop to the application of this right in most of the contemporary conflicts, which tend to be non-international in character. Paragraph 9.4.3. will further consider the issues of a (lack of) right of visit in the context of a non-international armed conflict.

Third, the belligerent right of visit and search is not a right that can be used in general, but is a right connected to the seizure of contraband or in relation to un-neutral service. And when one agrees that in the context

[539] Colombos, para. 870.
[540] Heintschel von Heinegg states that: Enemy merchant vessels may not be attacked unless there is sufficient proof that they serve a function that renders them legitimate military objectives. They are, however, subject to visit, search and capture, unless they are in neutral waters. W. Heintschel von Heinegg, The protection of navigation in case of armed conflict', in *The international journal of marine and coastal law*, vol. 18, no. 3 (2003), 401-422, at 407.
[541] SRM, Commentary, p. 196.
[542] Heintschel von Heinegg (2010), 325-371; J. Kraska,'Rule selection in the case of Israel's naval blockade of Gaza: Law of naval warfare or law of the sea?' in, *YIHL*, vol. 13 (2010), 367-395.

of capturing blockade-runners and enemy merchant vessels such a right is implied, it is only limited to those purposes. It is, as Higgins states; 'not a substantive and independent right, it is a means justified by the end.'[543]

Fourth, and most important for the legal challenge of maritime interception, the operational advantage of this right is that the belligerent does not need prior authorization from the flag State to board the vessel. The underlying rationale of this right is based upon the consideration that States do not take responsibility over the trade in which their nationals are engaged.[544] A vessel that carries contraband, therefore, also does not, in principle, endanger the neutrality of the flag State itself.

Fifth, the threshold to use this right is that the commander of the visiting warship needs to have a *reasonable ground for suspicion* that a vessel is not neutral, either by carrying contraband or by flying the enemy's flag, or by breaching a blockade. The SRM notes in its Chapter V, rule 118, that in order to exercise the right of visit during a conflict, reasonable grounds for suspicion must exist.[545] The commentary to Rule 118 adds to this that; 'The right of visit and search may not be exercised arbitrarily. An unrestricted practice of visit and search has never been considered to be in accordance with international law.'

Sixth, the capture of goods or vessels is subject to a further judicial scrutiny by a prize court or an equivalent competent judiciary body. Many of the doctrines and military manuals still mention that the fruits of the visit and search must be put before a prize court. Whether national legislation will still have prize court regulations, however, may be less obvious today. A prize court adjudicates the lawfulness of the seizure of the confiscated vessel and goods. Only after the prize court has given its judgment, will the goods or vessels change ownership. As there is still no international prize court, all prizes are brought before a national court.[546] Although the Helsinki Principles on the law of maritime neutrality have adopted a principle which states that: confiscation without a prize court

[543] A.P. Higgins, 'Visit Search and detention', *BYBIL*, no. 43 (1926), 43-53, at 43.
[544] Colombus, para. 866
[545] Rule no. 118 SRM reads:

> In exercising their legal rights in an international armed conflict at sea, belligerent warships and military aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.

[546] Although Hague Convention no XII (1907) was supposed to establish an international prize court to adjudicate prizes in appeal, the Convention has never come into working.

decision is prohibited,[547] some States appear to deviate from this position.[548]

As a last and seventh point to note here, as has been said many times in the above paragraphs, the belligerent right of visit and search, is a *right*. This means that there is no obligation to use it. If, politically or operationally, it may be more opportune to decide otherwise and instead use the peace-time right of visit or perhaps an extant right of visit based on a UN-Security Council mandate, a State is free to do so. Examples from practice of this are mentioned in Chapter 3 in relation to the right of visit during operation *Iraqi Freedom*.[549]

In sum, although it appears that the belligerent right of visit and search may in first instance be a far reaching authority in the sense that it does not need the consent of the flag State to be applied to foreign flagged vessels, which makes it a very effective tool for warships to use, it is also restricted to a number of above mentioned limitations. When one delves deeper into the legal weeds of the law of naval warfare, even more limitations may become apparent.[550]

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[547] Para 5.2.2. Helsinki Principles.

[548] The *UK Manual on the Law of Armed Conflict* (2005) mentions that:

> The United Kingdom has not used prize courts for many years and unlikely to do so in the future. Where a vessel or aircraft is captured by United Kingdom armed forces it will normally be deemed to be the property of Her Majesty's government UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, 2005), para. 12.78.1. It is, however, remarkable that this paragraph is not repeated in the chapter on maritime operations.

The US and Israel still appear to accept the validity of having prize courts. Israel has submitted the Finnish vessel *Estelle*, captured while trying to breach the Gaza blockade in 2012, before a court (see http://opiniojuris.org/2014/01/13/lieblich-guest-post-yet-another-front-israelipalestinian-lawfare-international-prize-law/). According to Brown, during the Iraq War in 2003, the US prepared for prize taking and assigned competent court to do so. In 2002, The Netherlands has deleted from its domestic laws the competency of the *Hoge Raad (the supreme court of Netherlands)* to judge prize cases, even though the Netherlands Maritime doctrine of the Netherlands Navy still recognizes the need for prize courts. See more elaborately on the current state of Dutch prize law, M.D. Fink, 'Toute prise doit être jugée. Opmerkingen over het Nederlandse prijs(proces)recht', in *MRT*, vol 106. no. 6 (2013), 211-219. The Hoge Raad (The Supreme Court of the Netherlands) has only once made use of its prize law competency. This took place in the *Nyugat*-case (1956) which concerned the capture made by the Netherlands Navy during the beginning of the Second World in the Far East.

[549] See Chapter 3, paragraph 3.1.2.4.

[550] For instance with regard to convoying neutral merchant vessels by neutral warships and the position that reasonable suspicion must exist that a vessel is carrying contraband at that very moment, not a reasonable suspicion that the vessel *has* carried contraband but is now empty and is already on its way back to a neutral port. Additionally, the right can only be used in seas where military operations are allowed. The *ius ad bellum* may also have an effect on the use of ius in bello authorities in the context of maritime interception operations. During the Iran-Iraq War (1980-1988) this 'blurring' between legal basis and legal regime in self-defence operations at sea emerged in the context of the authority for a right of visit. Back then, Ronzitti argued that the belligerent right of visit and search itself is also governed by the conditions of self-defence as extra condition to be taken into account.

9.4.2. The subregimes of the law of naval warfare

As mentioned, the belligerent right of visit and search is a means to ascertain other rights of the law of naval warfare. As such, the right of visit is connected to a number of subsets of the law of naval warfare: the law of contraband, the law of un-neutral service, the law of blockade and the law that regulates the capture of enemy merchant vessels. What these subsets have in common is that they primarily aim to limit the opponents economic manoeuvre space during international armed conflict, and are therefore also known as the legal regime that supports economic warfare at sea. In a simplified manner, which however captures the essence of the differences between these three subsets, would be to say that blockade and the capture of enemy merchant vessels aims to stop vessels, the law of contraband aims to stop goods and un-neutral service focuses on stopping persons and communication. The following paragraphs very briefly touch upon the essence of these different subsets.

Ronzitti suggested this view in 1988, questioning how the law of naval warfare was influenced by the law of self-defence. He stated that:

> 'one can say that the measures of economic warfare are not in themselves inconsistent with the right of self-defense, but they are lawfully exerted in so far as they meet the test of necessity and proportionality….It is reasonable to state that in a larger scale conflict, measures of economic warfare are justified, while in a small conflict they are less justified or not justified at all".

His line of thought may have been influenced by the Iran-Iraq War and the question how neutral shipping could best be protected, and by the UK's view after the Barber Perseus was boarded in January 1986 by Iranian warships some miles outside the Iranian territorial waters The UK Minister of Foreign Affairs stated this much quoted answer to a parliamentary question on the incident:

> The UK upholds the principle of freedom of navigation on the high seas and condemns all violations of the law of armed conflicts including attacks on merchant shipping. Under Article 51 of the UN Charter, a state actively engaged in armed conflict (as in the case of Iran and Iraq) is entitled in exercise of its inherent right of self-defence to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicion proves to be unfounded and if the ship has not committed acts calculated to give rise to suspicion, then the ship's owners have a good claim for compensation for loss caused by the delay. (Quoted from, C. Gray, 'The British position in regard to the Gulf Conflict', in *International Law and Comparative Law Quarterly*, vol. 37 (1988), 420-428, at 423.)

Heintschel von Heinegg, in 2007, stated that this British position should not be regarded as to reflect customary law for the reason that the ius ad bellum and ius in bello must be regarded as separate areas of law. W. Heintschel von Heinegg, '"Benevolent" third states in international armed conflicts: The myth of the irrelevance of the law of neutrality', in M.N. Schmitt and J. Pejic (eds), *International law and armed conflict: Exploring the faultlines* (2007), 543-568, at 262-265.

9.4.2.1. The law of contraband

Neutrality is breached when a neutral vessel carries goods that are considered to be contraband by one of the belligerent parties *and* is bound for the enemy.[551] To capture a neutral ship or goods, these two conditions need to be considered. The latter condition of destination has been developed into the notion of continuous voyage, which accepts that goods that *ultimately* end up in enemy hands can be captured. Interestingly, the condition of destination excludes capturing vessel that sail *from* enemy territory. With regard to the first condition relating to contraband, belligerent parties should make public which goods they view to be contraband, although the practice of publishing contraband-lists and the distinction between different types of contraband seems to be under debate.[552] The law of contraband does not focus on persons. When during the inspection the vessel's cargo appears to be contraband, the belligerent warship can capture the goods and vessel and bring them before a prize court that adjudicates the status of captured goods and vessel. The consequence of carrying contraband, therefore, is the loss of goods and possibly vessel.[553]

Inspecting neutral vessels for contraband is, in principle, not geographically limited under the law of naval warfare, other than that it is only allowed in the maritime areas where military operations can take place, which are the maritime areas outside the territorial waters of a neutral State. Visit and search by belligerent is not allowed in neutral waters. In practice, the belligerent right of visit and search could for operational and political reasons be limited to the proximity of the theater of operations. Furthermore, the *ius ad bellum* may have a limiting impact in the sense that the proportionality principle could limit, for instance, the extent as to which visit and search could be conducted in waters far removed from the actual theatre of operations.[554] Lastly, a number of exceptions to the belligerent right of visit and search against certain particular vessels

[551] The conditions of contraband and destination is also underlined in paragraph 5.2.1. and 5.2.3. of the Helsinki Principles on the law of maritime neutrality (1997).

[552] Gioia & Ronzitti (1992), 232. They mention that legal writers opine that the belligerent practice of enlarging contraband lists to comprise all goods considered to be useful for the enemy makes the difference between absolute and conditional obsolete.

[553] 'The Persian/Arabian Gulf Tanker War: International Law and international chaos', in *ODIL*, vol. 19 (1988), 299-321, at 306.

[554] See on the effect of *ius ad bellum* on *ius in bello*, T.D. Gill, 'Some consideration concerning the role of ius ad bellum to targeting', in P.A.L. Ducheine, M. N. Schmnitt, F.P.B. Osinga (eds.), *Targeting. The challenges of modern warfare* (2015), 101-120.

exist. One such rule is when neutral vessels are sailing under convoy of a neutral warship.[555]

9.4.2.2. The law of un-neutral service

Whereas the law of contraband focuses on goods, the law of un-neutral service focuses on persons and dispatches carried for one of the belligerents.[556] An example is the carrying of persons or troops by a neutral merchant vessel who belong to the armed forces of the enemy State.[557] The scope of activities, and there with the whole concept, by a vessel that is considered un-neutral aimed to aid a belligerent party is however unclear. The line between un-neutral service and taking part in hostilities may, therefore, also be hard to draw.[558] The difference is significant because in the first situation a vessel may not subject to direct attack, where in the latter this may be possible. It thus depends on the nature of the service that is rendered by the neutral vessel. Articles 45 to 47 of the (unratified) London Declaration give examples of what can be viewed as un-neutral service by a neutral vessel. These articles do not resolve the former question, but at least underline that as a minimum belligerents can take action (including boarding and seizure of the vessel) against neutral vessels that display assistance to the enemy.

9.4.2.3. The law of blockade

A right of visit is also implied in the law of blockade. A blockading belligerent force can stop and capture vessels that breach or attempt to breach a belligerent blockade, under the conditions that the blockade is lawfully established. To lawfully establish a blockade, it must be notified, conducted impartially and be effective.[559] Apart from the one rule in the Declara-

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[555] Rule 120 SRM, Art. 61 LD; W. Heintschel von Heinegg, 'The current of international prize law', in H.H.G. Post (ed.), *International Economic Law and Armed conflict* (1994), 5-34.
[556] R.W. Tucker, *The law of war and neutrality at sea* (1955), 318.
[557] In the *Asama Maru* incident (1940) the UK took the position that even persons that were not yet military, but were returning to their homeland and could possible take up military service could also be taken prisoner. The Japanese Government protested against this view. C.G. Dunham, *The Asama Maru incident of January 21, 1940,* paper prepared for the thirteenth annual Ohio valley history conference (October 1997).
[558] Tucker mentions that the use neutral merchant vessels for troopships or mine laying would be taking part in hostilities.
[559] See generally on the conditions of establishing belligerent blockades, M.D. Fink, 'Contemporary views on the lawfulness of naval blockades', in *Aegean Review of the Law of the Sea and Maritime*

tion of Paris (1856) on effectiveness,[560] the law of blockade is not codified, but rather based on customary law. The *London Declaration* (1909) attempted to codify the rules on blockade,[561] but the Declaration remains unratified. Although no codified and specific rule exists that expresses the belligerent right of visit within the context of blockade, because vessels that breach or attempt to breach a blockade are liable to capture,[562] the right of visit must be implied in order to stop a vessel from breaching the blockade. Captured vessels are brought before a competent court that can deal with prize-cases. During the legal aftermath of the Gaza blockade that produced several reports and many scholarly articles, although the application of the law of blockade in the Gaza situation was widely contested, the right to visit a foreign flagged vessel within the context of blockade law was not.[563]

9.4.2.4. Enemy merchant vessels

The law of naval warfare still accepts enemy merchant vessels as subject to capture.[564] Once a vessel can be characterized as an enemy vessel, it can be captured. This, again, implies the authority to board the vessel to enable the capture of the vessel. A number of exemptions relative to capture exist, such as, hospital ships, vessels (under conditions agreed to by the belligerent parties) that carry relief goods for the civilian population or carry cultural property, cartel ships, vessels charged with a religious or non-military scientific activities, and small coastal fishing vessels employed in local trade, all under the condition that they do not misuse their exempted status to support military operations.[565] Even though an enemy merchant vessel may be exempt from capture, the vessel can still be visit-

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Law; vol. 1, no. 2 (2011), 191-215; W. Heintschel von Heinegg, 'Naval blockade', in M.N. Schmitt, W. Heintschel von Heinegg (eds.), *The conduct of hostilities in International Humanitarian Law, vol. 1* (2012), 203-228.

[560] Which, in rule number 4, states that a blockade must be effective for it to be establishes lawfully.

[561] One attempt of codifying the law of blockade can be found in the first 21 articles of the London Declaration (1909).

[562] SRM, rule 126 (f), art. 14, 17, 20 LD.

[563] A/HRC/15/21, for instance in paragraph 56, by stating that "Thus, if there is no blockade, the only lawful basis for intercepting the vessel would be …" implies that a right of visit is accepted within the context of blockade.

[564] See W. Heintschel von Heinegg, 'The law of armed conflict at sea', in D. Fleck (ed.), *The handbook of international humanitarian law* (3r ed. Oxford University Press, 2013), 486-498; SRM, section IV.

[565] See Article 4 Hague Convention no. XI (1907), Article 25 GCII, and section 136 SRM.

ed and searched.[566] In the event that there is no certainty as to the character of the vessel, the right of belligerent visit and search allows for inspection of the vessel to ascertain its neutral character or its exempted status from capture.

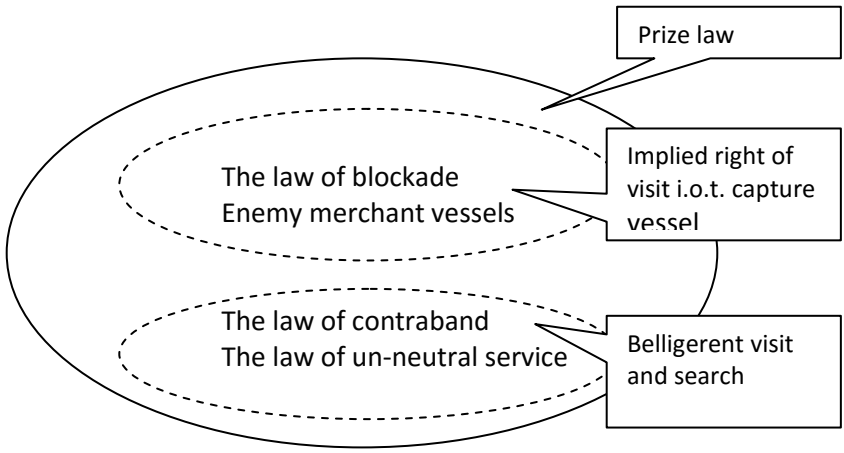

Figure 9.3. Relationship between prize law, belligerent visit and search and implied belligerent right of visit and search

9.4.3. Non-international armed conflicts

As mentioned above, the general point of view is that the law of naval warfare does not apply to non-international armed conflicts. Against the background of adapting maritime operations to counter contemporary threats, however, we see that some authorities are beginning to propose its applicability to non-international armed conflicts, albeit with certain modifications. McLaughlin for instance already noted that: "I think it uncontentious, for example, that a State may impose a blockade…against territory substantially controlled by a terrorist group which is also an OAG [organized armed group, MDF] engaged in an armed conflict with that State…'.[567] Even Heintschel von Heinegg, who usually appears to be

[566] SRM, section 135. Based on certain enemy merchant vessels are exempted from capture, such as hospital ships and small coastal fishing vessels. They are, however, not exempt from the belligerent right of visit. Von Heinegg (2013), 495.

[567] R. McLaughlin, 'Terrorism' as a Central Theme in the Evolution of Maritime Operations Law Since 11 September 2001.', in *YIHL*, vol. 14, (2011), 391-409, at 403.

straightforward in his non-applicability of the law of naval warfare to NIAC, has stated that the law of naval warfare can be applied in a NIAC; 'albeit modified, between parties to the conflict'.[568] As such, one can maybe find a trend towards applying the law of naval warfare in situations other than international armed conflicts. The *San Remo Manual* noted the possible application of the law of naval warfare in NIAC as follows:

> 'Although the provisions of this Manual are primarily meant to apply to international armed conflicts at sea, this has intentionally not been expressly indicated…in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations'.[569]

Apart from academic opinions spurred by the evolving nature of conflict and discussion of practice derived from the Gaza blockade and more historical cases[570], the view of non-application in NIAC's remains the starting point in recent debates on application of the law of naval warfare.[571] The Israeli blockades against Hezbollah in the Summer War of 2006 and against Hamas since 2009 did trigger some debate on the applicability of the law of naval warfare, in particular the law of blockade to be more precise, to NIAC's[572], but it has not yet matured in any way that we can solidly conclude that the traditional standpoint has actually changed. The most

[568] Heintschel von Heinegg (2011), 213.
[569] SRM, p. 73.
[570] During the Algerian Crisis of 1955-1962 in which France, based on self-defence, controversially used the belligerent visit and search during a NIAC. See Papastavridis (2013), 95-97.
[571] The non-applicability of the law of naval warfare *in toto* in NIAC's also depends on the question of the scope of what belongs to the body of "the law of naval warfare". There is a specific set of subjects that form the core of the law of naval warfare, such as prize law and maritime neutrality. But if these maritime warfare rules are complemented by the more protective Geneva rules, such as the law regarding hospital ships or the protection of shipwrecked, which are also standard topics within the law of naval warfare, it starts getting more difficult to deny that certain parts of the law of naval warfare do not apply in a NIAC. Although the ICRC study on customary international customary law did not look at the law applicable to naval warfare, it has included a number of rules on the protection of medical transports and of protection of shipwrecked that apply (also) to the maritime dimension and that may overlap the law of naval warfare. See H.M. Henckaerts, L. Doswald-Beck (eds), *Customary international humanitarian law* (2005), e.g. rule 29 on the protection of medical transports. Hospital ships are specifically mentioned. Rule 109-111 deal with the protection of shipwrecked. On other words, the broader the scope of subjects that are considered to be the law of naval warfare, the less ground the traditional view has to remain intact as a whole.
[572] Obviously, questions as to whether Israel invoked the right of self-defence against the Hezbollah or Lebanon, or how symbiotic Al-Qaida and the Taliban were considered all play a role. See on these issues; Ruys (2010), 450-457; Ducheine and Pouw,'Operation Change of Direction: A short survey on the legal basis and applicable legal regimes', in *NL ARMS* (2009), 51-96; T.D. Gill,'The Eleventh of September and the Right of Self-Defense',
in: W.P. Heere, N.N.G. International Society for Military Law and the Law of War (eds.), *Terrorism and the military: international legal implications*, (The Hague: T.M.C. Asser Press, 2003), 23-37, 26.

important conclusion that follows for the issue of maritime interception, is that the belligerent right of visit and search does not apply in this type of conflict. This obviously poses challenges in modern conflict that is often characterized by a NIAC-nature and which is not restricted to the land territory only, but extends also out to sea. As such, naval forces can be confronted with a situation that is characterized as a NIAC and a non-state opponent, in which there is no generally accepted right to visit a foreign flagged vessels in order to take action against these non-state actors at sea. Two examples from practice are the naval dimension of Operation *Enduring Freedom*, operating in the Indian Ocean to find and deter Al Qaida and Taliban members, and Operation *Active Endeavour*, the NATO anti-terrorist operation in the Mediterranean Sea.

9.4.3.1. Operation Enduring Freedom

The situation at sea with regard to operation *Enduring Freedom* is interesting because States have reacted differently on both the issue of the legal characterization of the conflict at sea and its consequences for the right of visit. It is widely viewed that the legal character of the conflict in Afghanistan changed after the Taliban had been brought to a fall and the *Loya Jirga* was convened in June 2002. The military operations were then in support of a newly chosen Afghan Government. From that point onwards, the status of the armed conflict changed from an international to a non-international armed conflict.[573] If indeed an international armed conflict existed before June 2002, it was during a period of only about 7 months.[574] From the point of view of the limited application of the law of naval warfare only in international armed conflict, the naval dimension would lose a valuable tactical tool for deterring terrorists at sea if the conflict were to be considered a non-international armed conflict.

Participating warships in the OEF-coalition boarded and searched merchant vessels for possible terrorists. States, however, had different views on which right of visit applied, which is connected to the question of applicable legal regime. The UK viewed that the legal basis for military force as a reaction to 9/11 was based on Article 51 of the UN-Charter, but considered only the land operations in Afghanistan to be conducted under

[573] See e.g. Pejic (2007), 345.
[574] From October 2001 to June 2002.

the law of armed conflict. The approach was taken that the factual situation at sea was not considered an armed conflict situation. Because the UK chose this position, it meant that the belligerent right of visit could not be applied by British warships and that any persons captured would not be prisoners of war. The UK thus considered that parts of the same military campaign that operated in a completely different geographical area and contextual situation can be governed by a different legal regime. Brown indicates that the authorities for British warships were (therefore) not beyond what was authorized under peacetime visit and search.[575] By reliance upon peacetime right of visit, the change of conflict status did not have any effect on the right used.

The Netherlands considered itself to be in an armed conflict with Al Qaida and the Taliban.[576] In contrast to the UK, the Netherlands did not distinguish between land and sea operations and viewed the conflict *as a whole* as an armed conflict. As such, it also considered the law of naval warfare applicable, which opened the door to the belligerent right of visit and search.[577] The Netherlands government in its documents did not explicitly distinguish between an international and a non-international armed conflict. It also did not change the boarding authority after June 2002.[578] The belligerent authority was, however, watered down in the sense that - as a matter of policy rather than law- master's consent was asked before a vessel was boarded. In practice, therefore, a certain watering down of the authorities was made to avoid possible unnecessary controversy.[579] The

[575] Brown, Panel III, Commentary – maritime and coalition operation', in *ILS*, vol. 79 (2003), 303-307.
[576] Letters to parliament, 27 September 2004, Inzet Nederlands fregat in operatie Enduring Freedom.
[577] Eindevaluatie CTF 150, *Ministerie van Defensie*, 18 September 2006, p. 4.
[578] The *Eindevaluatie CTF 150* (18 September 2006) mentions:

> *'De status van gewapend conflict heeft tot gevolg dat op het maritieme deel van OEF het zeeoorlogsrecht van toepassing is. Dit vormt dan ook de juridische grondslag voor het kunnen uitvoeren van boarding operaties, dat een wezenlijk onderdeel is van het maritieme optreden. Onder het zeeoorlogsrecht zijn combattanten bevoegd om neutrale scheepvaart te controleren, om vast te stellen of zij ook daadwerkelijk neutraal zijn. Daarbij wordt onder andere gekeken naar de scheepspapieren en de lading, zodat kan worden bezien of er geen mensen of goederen worden vervoerd ter ondersteuning van de tegenpartij. …[…]…Zoals gebruikelijk bij deelname aan OEF heeft Nederland de ROE voor de Nederlandse militairen zelf geschreven en ter beschikking gesteld aan de andere coalitiepartners. Hoewel CTF 150 deel uitmaakt van OEF en derhalve, zoals gesteld, deelneemt aan een gewapend conflict is alleen het mogen boarden van scheepvaart daarvan een weerslag in de ROE.*

[579] During the beginning of the operation The Netherlands first did not authorize participating warships to board other vessels, but this changed during the course of the operation. See M. Leijnse, J.E.

Netherlands appears not to be the only State who thought it could use the belligerent right of visit. According to the Canadian Rear-Admiral Bob Davidson the Canadian naval contribution to OEF was also able to board vessels based on the law of naval warfare.[580]

With no sufficiently official public source available, it is hard to determine which right of visit the US used for its boardings in OEF. Although the general guidance for the US in OEF was that hostilities in Afghanistan were to be in accordance with the law of war, the US did not – systematically, it appears[581]- articulate the legal regime under which the boardings conducted under OEF took place. It kept underlining that its operations were based on the right of self-defence.[582] Also the *Special Warning no. 120*, published shortly after the 11 September attacks, underlined that US forces were to exercise appropriate measures of self-defence if warranted by the circumstances. It did not use any law of naval warfare terminology.[583] Views on the legal regime applied by the US range from a right of visit directly based on self-defence,[584] to assumptions that the belligerent visit and search was used, primarily because the US considered itself in a state of armed conflict.[585] One reference to the actual authorities for US warship on visits is found with Van Dyke, who states: "Attempts have been made to undertake these boarding operations with the consent of the masters of the vessels, but "the US notification made to the mari-

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Weijne, 'De bijdrage van de Koninklijke Marine aan de strijd tegen het terrorisme', in *Marineblad* (May 2002), 149-154. Also, in the *Letters to Parliament* of 27 September 2004 it is stated that:

> *Bij inspecties treden overigens alle maritieme eenheden van de operatie Enduring Freedom zoveel mogelijk op met instemming van de vlaggenstaat van het te onderzoeken schip.* [Inspections will be conducted as far as possible with the consent of the flag State, MDF]

[580] B. Davidson,' Modern naval diplomacy - a practitioner's view', in *Journal of Military and Strategic Studies,* vol. 11, issues 1 and 2 (Fall and Winter 2008/9), 1-47, at 18. But see also Papastravidis (2012, at 92) who appears to opine the belligerent right of visits continues to apply in a NIAC.

[581] See also K. Tabori-Szabo, 'Self-defence and the policy of drone strikes', in *JCSL*, vol. 3 (winter, 2015), 381-413.

[582] Klein, 274. Interestingly, with regard to this operation Klein refers to the specific legal basis for action, whereas in fact the specific legal regime may be meant, as the legal basis for the military operation has been clear from the outset.

[583] *Special Warning no. 120* is printed in Kraska & Pedrozo, at 95. They also explain that *Special Warnings* are used by the US to publish information about potential hazards that are caused by the political climate (at p. 88).

[584] K. O'Rourke, 'Commentary – Maritime & Coalition operations', *ILS* no. 79.

[585] Hodgkinson (2007) mentions that LIO's are legitimate as an exercise of self-defence as part of armed conflict. My assumption is that the latter part of the phrase implies the use of the law of naval warfare. Also in discussing the issue with several US Navy JAG's this point hasn't become any clearer.

time industry made it clear that vessels suspected of transporting or assisting bin Laden and senior al Qaeda leadership would be subject to the use of force to compel a boarding."[586] If this is an accurate statement, one interpretation could be that (and leaving aside for the moment debate on master's or flag state consent) the US interception operations in OEF appear firstly not to overstep the peace-time right of visit, but in situations where Al Qaida is actually spotted, the fact that the person is on board foreign vessel does not stop US military in what is viewed as a necessary and proportional action of self-defence.[587] Here, it seems that the right to visit is, interestingly enough, derived from the *ius ad bellum* itself.

9.4.3.2. Operation Active Endeavour

The 9/11 attacks induced NATO to take naval action. In the early stages of OAE, the NATO's naval forces were not authorized to board vessels. This authorization was, however, acquired at a later stage of the operation, in 2004.[588] Interestingly, NATO's anti-terrorist operation OAE, although based on the collective self-defence provisions of Article 5 of the NATO-Treaty, authorized participating warships only to board when both flag State and master consent existed. The following text is found in a NATO-report on the visits-regime of OAE:

> 105. Once a suspicious ship is identified, OAE assets could hail the ship, request to board, and eventually track the ship into territorial waters where a properly alerted national maritime authority would take appropriate action. Boarding takes place only with the compliance of the captain of the ship and the flag State, in accordance with international law. If the captain of the suspicious ship does not wish to be boarded, NATO forces will follow the vessel and alert the port in which it is coming to rest, whose authorities will have the legal right to examine it.[589]

[586] J.M. von Dyke, 'Balancing Navigational Freedom with Environmental and Security Concerns', *in Colorado Journal of international environmental law and policy* vol. 19 (2004), 19-28, at 25.
[587] This view is also coined by Wendel. Wendel (2007), 32.
[588] NATO parliamentary Assembly, Committee Reports 2008 Annual Session (158 DSC 08 E bis) - NATO Operations: Current Priorities and Lessons Learned. (At: www.nato-pa.int/default.asp?SHORTCUT=1476). Para. 105.
[589] 158 DSC 08 E BIS - NATO operations: current priorities and lessons learned, at paragraph 105. Available at: http://www.nato-pa.int/default.asp?SHORTCUT=1476.

Lieutenant Ioannis Kizanis (Hellenic Navy) mentions the visits regime in OAE:

> Initially the main task of NATO's naval units was to "hail" merchant vessels transiting their patrolling areas (i.e., to call them on a VHF channel, ask questions about the ships' identity, cargo, and activity, visually identify them, and monitor their movement for as long they were in sensor range). In other words, NATO's activities were limited to the right of approach. This information was then related to CCMAR Naples, Italy and NATO's shipping center in Northwood, UK. In April 2003 the mission was modified to include compliant boarding operations on suspect vessels, "compliant" in this case meaning with the prior consent of the ships' masters and flag States, which gives the boarding full legitimacy under international law.[590]

Vice-Admiral Cesaretti, commander of OAE in 2005, in his article in the *NATO Review* underlined also that inspection of foreign flagged vessels were conducted with the consent of both flag and master.[591] There is, however, no official public record available regarding the legal framework on the legal regime used in OAE. The relevant question would be whether NATO considered itself to be in an armed conflict. Possibly, NATO considered that the visits were based on the law of naval warfare, but for various political reasons opted for a very restrictive use of the belligerent right of visit and search. Another reason can be that, despite the fact that Article 5 was invoked, against the background of the actual situation at sea and that NATO actions were an act of solidarity rather than acts of war or the start of actual hostilities against terrorists, it would be problematic to consider that participating States in this NATO-operation were engaged in an armed conflict. Furthermore, even if this would have been the case that NATO-states considered themselves to be in an armed conflict, the status of the conflict would have been non-international after June 2002. This bars the possibility of making use of the belligerent right of visit and search.

Whatever decision NATO made in the past to decide not to use the belligerent right of visit and search during OAE, it subsequently fell back

[590] I. Kizanis, 'Probable cause" for maritime interdictions involving illicit radioactive materials', Thesis for the Naval Postgraduate School, California (2008).
[591] R. Cesaretti, 'Combating terrorism in the Mediterranean', *NATO Review* (Autumn 2005).

upon the peacetime visit and search framework. One legal possibility of boarding of foreign flagged can be to get consent of the flag State. The multitude of participating States within NATO, however, has generated another discussion which is focused on the master/flag state consent issue. Because individual States within NATO have different opinions on this issue, it may be that the only politically acceptable way within NATO was to authorize visits through consensual boarding with both flag State and master consent. Be that as it may, the approach taken by NATO meant that they did not have to change their ROE because of the changing character of the conflict in 2002.[592]

9.4.5. A NIAC-right of visit?

The preceding paragraphs on non-international armed conflict and the challenge of the non-existence of a right of visit in NIAC's may have given rise to a phenomenon that could be called a 'self-defence, or NIAC right of visit'. Chapter 6 has noted that self-defence is also argued as a direct legal basis to board a foreign flagged vessel, in which the conditions and characteristics of self-defence serve as the legal basis to board the vessel. Chapter 6 notes that either the characteristics of self-defence (not dependent of the will of another State and the emerged view that acting against non-state actors is, under conditions, is not limited to one's own territory or territory that support those non-state actors) is balanced against the sovereignty of a State to allow for crossborder operations in situations where a NIAC exists. The consequence of an evolving right of self-defence for maritime interception could be that when the right of self-defence applies to armed attacks conducted by non-state actors and potentially opens the door to take action on the territory of a State where the non-state actor is located and operating from, it seems counter-intuitive to say that no right of visit would be available to counter seaborne (threats) of attack. This would, arguably, be both necessary and proportionate if there were clear indications that the vessel was transporting members of the opponent armed group under the flag of a vessel where the group has a

[592] Different than OEF, OAE is a NATO operation with a set of rules of engagement (ROE) that has been drafted according to the usual NATO process of ROE-drafting. Instead of coalition ROE, such as in OEF where in principle all states bring their national ROE, NATO ROE are usually one set that applies to all participating states, but with possible caveats attached if states for political, legal or operational reasons cannot concur with the ROE.

substantial presence, or where the vessel itself had come under the control of the armed group or otherwise posed a threat of attack. It would, however, not in principle apply to the vessels of third States, since the right of self-defence does not apply to the territory of third States. If one would take yet one step further in this line of reasoning, to accept that there are, in principle, no geographical boundaries when combating non-state actors, this step would be that if the flag State is unwilling and/or unable to take action against a situation where its vessel was used for or by a non-state actor. Another possible argument to circumvent flag State jurisdiction is that, rather than considering the non-state actor as passenger on board the vessel, the use of the vessel by the non-state actor could be such that the non-state actor has complete and factual control over the vessel and uses it solely for the purpose of its military operations. In this scenario it might be argued that the vessel has lost its link with the flag State, which has *de iure* jurisdiction, but is *de facto* completely under the control of the non-state actor. If the vessel is under the factual control of members of an organized armed group, it becomes a military objective. When self-defence is the legal basis, the character of the conflict amounts to a non-international armed conflict and the vessel can lawfully be considered a military objective, attacking is would arguably not be a wrongful act against the flag State.

Different than consent, in which the State waives its exclusive jurisdiction over a vessel and also sets the scope of authority for the boarding State, this is not needed in the case in a self-defence visit. Authorities and limitations are mainly regulated by LOAC applicable to non-international armed conflict. Therefore, although such a boarding cannot make use of the more elaborate law of naval warfare, which allows the boarding State to seize goods or vessels, it does require the State to act in accordance with NIAC-regulations when on board the vessel. Although the US asserted that in the war between the US and Al Qaida and its affiliates the Geneva Conventions would not apply because it fitted neither the regime applicable to international armed conflicts nor that of a non-international armed conflict, it is well known that this approach was later overturned by the US Supreme Court in the *Hamdan v. Rumsfeld* case (2006) to at least apply the mini-convention of Common Article 3 GCI-IV. Accordingly, Common Article 3 would also apply during a 'NIAC-rights of visit'.

Important to note is that the purpose for boarding a foreign flagged vessel is different than the primary purpose of why the right of visit and search exists in an international armed conflict. In that perspective the legal means exists, simply said, to pursue economic warfare against an opponent. In the traditional sense, the belligerent right of visit and search is meant to be a means for the purpose of enforcing the rules on prize, such as the capture of contraband that is destined for the enemy. Quite differently the above mentioned right of visit applies the means of a right of visit to be able to act against the non-state actor itself or it instruments, such as WMD or the vessel as a military objective. In other words, the right is used directly to be able to act against the opponent. Remotely, it may possibly resemble an implied right of the belligerent in an international armed conflict to board an enemy merchant vessel in order to capture it. Taken this different purpose of the right of visit in non-international armed conflict it might not be wholly appropriate to start from the point of view to question whether the existing belligerent right of visit and search in an international armed conflict should apply to a non-international armed conflict, as they are incomparable in purpose.

9.5. The right of visit conferred through the UN-collective security system

The collective security system can be a legal basis to authorize maritime interception operations. Interestingly, the resolutions have never *explicitly* mentioned that vessels can be boarded and searched to enforce sanctions. This must be read from the word "inspect" that will in a practical sense include the boarding of the vessel for physical inspection of papers, vessel and cargo. In order to be effective in enforcing sanctions, ultimately, it also means that any illicit goods may be seized. What the exact authority is during a MIO that is conferred through the UN-collective security system will depend on the applicable resolutions in the specific conflict. Additionally, where such measures involve persons, human rights law will also be applicable. And where the factual situation of an international armed conflict may arise, the law of naval warfare would start to play a part. As the scope, purpose and content depend on the extant UN-resolution, measures may vary per operation. In the early maritime embargo operations since the MIF, a standard phrase was introduced in the

resolutions that mandate the scope of the authorities. The resolutions relating to the embargoes of Iraq, Former Yugoslavia, Haiti and Sierra Leone all authorized measures "*to halt all inward and outward*[593] *maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation*" of applicable resolutions. The embargo with regard to Lebanon and Libya used other language, which related more specifically to the respective situation in those conflicts.

The above mentioned phrase in the early resolutions did not contain any threshold of suspicion. This would seem logical, because naval commanders were to halt *all* inward and outward bound shipping in the operational area. The phrase "all inward and outward shipping" implied that every vessel in the given area could be stopped, even if there was no suspicion. Interestingly, the Libya resolution 1973 (2011), did adopt through the use of different wording, a reasonable suspicion standard.[594] In the case of the Libyan embargo, the enforcement power conferred by the Council was therefore different than the 'blanket authority' to halt every vessel, as provided in earlier resolutions. Vessels were not totally denied from entering or leaving Libyan ports. In practice, the reasonable suspicion standard is derived from different factors and may even be satisfied by the fact that vessels were sailing into the direction of one of the Libyan ports.[595] Additionally, the purpose of the visit depends entirely on the text of the resolution. The UNSC can choose from a wide range of sanctions, from sanctioning the influx of arms[596] or oil,[597] to a comprehensive trade embargo,[598] to all types of commodities. In the case of Former-Yugoslavia the embargo started as an arms embargo[599] and then expanded to an export embargo of the import of all commodities and products originating from Serbia and Montenegro.[600] SC-Res. 2146 (Libya), on the other hand, was

[593] In the case of Sierra Leone the resolution only authorized inward, not outward bound traffic. See SC-Res. 1132 (1997).
[594] See paragraph 13 of SC-Res. 1973.
[595] In general vessels will be hailed for inspection and directed to a waiting area to await inspection at sea. For different reasons such as that inspection at sea is not opportune due to weather circumstances, because the suspicion endures but needs more thorough inspection, or that prohibited items are found that need to be of leaded, vessels can be diverted to a port.
[596] E.g. MTF UNIFIL, Libya, Former-Yugoslavia and Haiti.
[597] E.g. Libya, after the 2011 conflict, with SC-Res 2146 (2014).
[598] E.g. Iraq. The UNSC established a trade embargo of all products exported from Iraq and Kuwait and sale and supply to Iraq and Kuwait. SC-Res. 678 relaxed embargo to allow humanitarian supplies. SC-Res. 688 ended embargo against Kuwait.
[599] SC-Res. 713 (1991).
[600] SC-Res. 757 (1992).

very limited in its purpose. It only allowed the boarding of vessels that illicitly exported crude oil from Libya and only consisted of vessels that had been designated by the UN-Libya Sanctions Committee.

The operational level challenge is that there is often a level of uncertainty relating to the goods that can be stopped and taken, which is derived from the text of the resolutions. Resolutions that allow stopping for instance "arms related material" leave a margin to commanders to decide within the context of the conflict what can be considered as arms related material. To illustrate, if the State under sanctions uses a specific type of civilian vehicle to support its military operations, then arguably these are arms related material. But it leads to complex questions. If fuel is not sanctioned, can fuel than still be stopped if there a reasonable certainty that the fuel is used for military vehicles or aircraft? This obviously leads to a need for more detailed understanding of the situation in order to make these decisions. Interestingly also is that, whereas maritime embargo operations have always focused on goods, SC-Res. 1973 also expanded this to include stopping mercenaries at sea that were bound for the conflict.[601] As such, persons have come into the maritime embargo operations arena.

As mentioned, effective enforcement of such resolutions implies that items can also be confiscated. However, notwithstanding this authority, this is a challenge from an operational perspective, because usually the ultimate mission aim is to stop the traffic of sanctioned items, and confiscation at sea poses many logistical challenges, confiscation of goods is not automatically the *modus operandi*. Vessels can instead also be diverted to a port for inspection of simply turned back so that sanctioned goods will not arrive at the State under sanctions. In the case of MTF UNIFIL, UNIFIL's website mentions that since the operation has started, it hailed 42.500 vessels and referred 1.670 to the Lebanese authorities for further inspection; no mention is made of any boardings that have taken place. Instead: 'All merchant vessels classified "suspect" are monitored and, if inbound to a Lebanese harbor, are referred for inspection to LAF authorities.'[602] Apart from the discussion on the legal basis for the MIO in UNIFIL, a practical reason for this is that it may be easier to let the suspected vessel come into port where it can to be fully inspected in port and where

[601] SC-Res. 1973 (2011), paragraph 13.
[602] http://unifil.unmissions.org/Default.aspx?tabid=1523.

all the technical and legal facilities are present, rather than a potentially high risk visit and search at sea.

Unlike the belligerent or peacetime manifestations of the right of visit, there is no procedure that regulates the confiscation of the goods at sea in these types of operations. Under the law of naval warfare a prize court will judge whether the prize was lawfully taken. In peacetime circumstances a criminal court may judge whether a suspected individual is criminally punishable and the person itself can instigate civil actions against the State. On land, States will have adopted national laws to enforce the UN-sanctions. Such laws may apply at sea, but often will not have specific language to that effect making it essentially a discretionary matter for the operational commander as to how sanctions can be enforced. Article 110 UNCLOS includes a compensational clause for losses and damages if suspicion is determined to be unfounded. Such procedures are not automatically existent in relating to maritime embargo operations when goods are confiscated at sea. If legal proceedings with regard to the confiscation are instigated, one legal avenue to take would be against the State of the intercepting warship. The only known legal case to this author is the *Lido II*-incident, which occurred during the Former-Yugoslavia embargo and came before an Italian court, as the vessel was brought within the geographical jurisdiction of Italy.[603] During that court case, the European Court of Justice (ECJ) was asked to advise on the incident, in particular whether a breach of the embargo had actually taken place now that the vessel had not enter the territorial sea of Montenegro but was stopped just before.[604]

The resolutions usually do give some guidelines as the geographical limitations of the embargo authorities. When it mentions that it allows the inspection of inward and outward bound shipping, it implies a certain proximity to the target State is the operational area in order to be able to separate the inward and outward shipping from the rest of the maritime traffic. The geographical and operational circumstances obviously will have an impact on the naval operational areas in which the embargo will take place. In the MIF-operation, for example, maritime interception opera-

[603] See Chapter 3 on this incident.
[604] *ECJ*, case. no. C-177/95, 27 February 1997.

tions were conducted in the Gulf of Aqaba to ensure that no prohibited products were indirectly shipped to Iraq.[605] In the case of Libya the resolution was explicit as to geographical limitations by stating that the enforcement authority existed on the high seas,[606] which, as a result, meant that the territorial waters of Libya were outside the embargo zone. NATO, therefore, dedicated a maritime area of operations in the Southern Mediterranean Sea close to Libya itself, but outside the territorial waters.[607] The area is usually also published so that maritime traffic is made aware of in what location they can expect warships to enforce an embargo.[608]

Absent specific limitations derived from the specific resolution, Chapter VII maritime enforcement measures can be conducted both inside and outside the territorial sea of the targeted State. They cannot be conducted within the territorial waters of other States without the permission of the coastal State.[609] In early MEO that resembled maritime peacekeeping operations questions were raised on operating inside the territorial seas of the State under sanctions. In essence because of the fact that one of the conditions of peacekeeping operations is that the forces operate under the consent of a State within its territory. MIO conducted under Article 42 are

[605] Fielding (1993), 1220-1221. The area of operations for the MIF was established by special warning no. 80 (1990).

[606] Although this could have resulted into a completely different enforcement model, military planners derived from the resolution a military activity that resembled traditional maritime embargo operations off the coasts of the targeted State. That decision- makers had a traditional maritime-arms-embargo-type operation in mind when the resolution was adopted, can perhaps be deduced from the fact that there was no opposition against the implementation of these military activities; not even by the Sanctions Committee. In the end, NATO's maritime operation was conducted only in the central Mediterranean Sea off the coasts of Libya. An established Maritime Surveillance Area (MSA) tied the actual maritime operations area to the Libyan coast. Notifications were sent out to inform the shipping community of the embargo's existence and to establish a reporting system for vessels that were sailing to or from Libya.

[607] SC-Res. 1973 (2011) and 2146 (2014). In the Libyan conflict the UNSC did not so much focus on the area of crisis, but authorized measures that could be taken on the territory of each member State. Before revising some paragraphs of Resolution 1970 through the adoption of Resolution 1973, the Council seemed to consider member States' territory as the main geographical starting point for the embargo. Resolution 1973 then extended to the high seas the powers of member States with regard to the arms embargo (which had already been established by Resolution 1970). For naval enforcement operations at sea, this different 'expanded authority' approach brought the operational effect that the embargo could be enforced in the Libyan territorial sea. See more elaborately on this point: M.D. Fink, UN-Mandated Maritime Arms Embargo Operations in Operation Unified Protector', in *Military law and the law of war review* 50/1-2 (2011).

[608] See for instance in the case of Libya: NAVAREA III 170/11 (081415 UTC Apr 11). Following the adoption of SC-Res. 2009, NAVAREA III 170/11 was replaced by NAVAREA III 395/11. With NAVAREA 445/11, the MSA was terminated.

[609] During the MIF operations this led to oil smugglers that tried to reach Iranian territorial waters and then proceed to the Strait of Hormuz during which time the MIF was not able to stop them. T.P. Shaw, 'Arabian Gulf Maritime interception operations: balancing the ends, ways, means and risks', in *Naval War College paper* (1999), 5.

coercive peace enforcing operations and need not to have the consent of a State. As said, a-typical in this respect are the UNIFIL and Libya operations. The latter because it explicitly stated that the embargo could be enforced on the high seas, which was interpreted by NATO to the effect that enforcement of the embargo could not take place within the territorial sea of Libya.[610] The former because the resolution is construed on a double legal basis in order to support to Lebanese authorities. Chapter 5 has touched upon the discussion on the exact legal basis (either a Chapter VI or VII resolution, in combination with a consent of the Lebanese Government) for MTF UNIFIL, which in practice is not challenged because apparently no vessels are boarded but information on suspect vessels is transferred to the Lebanese authorities to deal with the ship in port. Because the Area of Maritime Operations (AMO) of UNIFIL lies both in the territorial sea and on the high seas (43nm wide from the coastline and 110nm long).[611] UNIFIL and Lebanon have made detailed arrangements where within the AMO UNIFIL is allowed to take measures, which has divided the AMO into different zones. UNIFIL units only operate within the zones that are in the territorial sea on request of Lebanon.[612] Under these circumstances the requirement of coordination with the Lebanese authorities for UNIFIL naval forces to conduct operations in the territorial seas of Lebanon signified that UNIFIL naval forces were only top conduct operations within the Lebanese territorial sea at the request of the designated authorities.

[610] In the case of Libya, the restriction to the high seas resulted in an operational gap in which vessels could move prohibited materiel from one city to another through the territorial sea only, or entered the Libyan territorial sea through the territorial seas of the neighboring States. When, however, one looks at the geographical limitation of the arms embargo in a wider perspective, including the whole mandate of Resolution 1973, one also ends up bringing to light some discrepancy with other authorized operations. The mandate to protect civilians under Paragraph 4 of the same resolution, for instance, does not state that enforcement operations have only to take place outside the Libyan territory. On the contrary, this part of the mandate solely focuses on the territory of Libya, which also includes the territorial sea. Maritime operations carried out under this part of the mandate – as long as they would not turn into occupation operations – were thus allowed to be implemented in the Libyan territorial waters too. Since Paragraph 4 of Resolution 1973 authorized all necessary means to protect civilians and civilian-populated areas, arguably this could have also been an authority to enter the Libyan territorial sea. However, for the interception operations to be legitimately carried out, the latter should be aimed at stopping a threat to civilians and civilian-populated areas, and not at enforcing UN sanctions.
[611] U. Haussler, Crisis response operation in maritime environments', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 161-211. A picture of the AMO can be found at: Ministerie van Defensie, *Eindevaluatie UNIFIL maritiem*, 25 April 2008.
[612] Kamerbrief inzake beantwoording schriftelijke vragen over de maritime bijdrage aan UNIFIL (Letters to parliament answering written questions on the maritime support to UNIFIL), 11 October 2006.

9.5.1. ‘All necessary means’

More challenging in terms of understanding the scope of authority during visits that are authorized by the collective security system, is when the UNSC does not explicitly authorize the enforcement of sanctions at sea, but when a MIO is based on the wording of *all necessary means*. As was discussed in Chapter 5, it is widely accepted that the phrase *all necessary means* implies that the mandate includes using military force to fulfill the mission as an ultimate means. On the level of coercive measures all necessary means can also be translated into the need to visit and search vessels in the pursuit of the mandate. One argument to support this is that because lethal means are ultimately possible, lesser means such as maritime interception operations may arguably also fall within the scope of the mandate. But in contrast to explicitly authorized enforcement, in these cases there is no detailed guidance at all on how and against whom maritime interception operations may be conducted. The filling in of the detailed purpose, scope and content of authority is basically left to the State or the commander that is interpreting the mandate, against the further legal environment of applicable legal regimes. If the operational situation necessitates the authority to stop fuel from coming into a State which will end up to supporting the fighting capacity of the opponent, or to stop individuals that would likely take part in the conflict, would *all necessary means* suffice to take those measures? This example could lead to indirect economic sanctions, which are usually provided for through a resolution that adopts such sanctions. Such action could therefore go beyond the scope of the mandate. If, however, the vision behind the mandate is to authorize such actions against the target State, this could well include actions, or even the applicability of the law of naval warfare including blockade. In other words, the scope, purpose and content of authority of visits based on *all necessary means* must be read in context of the aim and purpose of the resolution itself. Also here, and as will be discussed more elaborately in Chapter 11 on detention at sea, further conditions apply in cases where visits based on *all necessary means* are used to detain persons to which human rights law apply.

9.5.3. The law of blockade and Article 42 of the UN-Charter

Article 42 of the UN-Charter explicitly mentions the possibility of authorizing a blockade. Whether this also means that the law of blockade applies to this blockade is not entirely clear. Different options as how to interpret the use of a blockade within the context of the collective security system were already discussed in Chapter 5.[613] Historically seen, Article 42 was focused on large scale military operations in which the factual situation amounted to an international armed conflict (see Korea and Iraq (1990)). There is, therefore, some logic from an historical perspective in assuming that the purpose was that authorising a blockade as a military enforcement measure under Chapter VII of the UN-Charter would coincide with applying also the law of blockade to enforce it in practice. But nowadays, however, military operations that are authorized under Article 42, arguably, firstly do not automatically rise above the threshold of an armed conflict. And if they did, these conflicts are often characterized as non-international in character. Blockade as a method of warfare to which the law of blockade applies can only exist in cases where there is an international armed conflict. These points basically put an end to any assumption that the law of blockade automatically applies where the UNSC authorizes a blockade as a military enforcement measure. Following this line of argument, it still leaves the UNSC, however, with the possibility of using the *method* of blockade, without the *law* of blockade to automatically fill in the authorities. The scope, purpose and content of such a blockade would then depend on the text of the resolution, in which the UNSC can tailor the law of blockade in such a way to fit the specific circumstances. The advantages of a blockade based on Article 42, is in the first place that a blockade would not become unlawfully established when it does not fulfil all the conditions in order to legally establish a blockade.[614] Secondly, an Article 42-blockade could also be established in circumstances that can be characterized as a NIAC in which the UNSC could decide that the relevant legal features of the law of blockade apply in the given situation. At this stage, however, there appears to be no practice that could underline this view.

[613] See Chapter 5, paragraph 5.8.1.
[614] Notification, impartiality and effectiveness.

9.6. Final remarks

This chapter has examined the different manifestations of the right of visit that can apply during maritime interception operations. As the scope, purpose and content differs per type of visit, it is, obviously, of importance that warship commanders must ensure to keep them apart. Some manifestations are detailed because they are part of either international agreements, or its details have been widely accepted in customary international law, such as the belligerent right of visit and search. Some are, however, less clear and must either be detailed in the State's consent that waives the flag state authority, or must be interpreted through the actual texts and background of UN-resolutions. Generally, however, the different types of right of visit require a threshold (a reasonable ground for suspicion) before a boarding can take place. The exception is the early maritime embargo operations, which authorized the halting of all vessels for inspection. Although during the Libya-operations the threshold was also introduced for maritime embargo operations it is not unthinkable that the early resolution of resolutions will be used in future conflicts as this depends on the possible future need in conflicts. Second, a right of visit does not mean that once on board, automatically enforcement jurisdiction exists whenever it becomes clear that the suspected ship or person is in breach of law or a mandate. As Guilfoyle already noted in this sense: 'The general position is that authority to visit and inspect a vessel does not automatically extend to a right of arrest and prosecution. Unless relinquished or waived, a flag State has 'primary jurisdiction' to conduct any subsequent prosecution.'[615] One challenge with regard to the right of visit lies in the fact that contemporary conflicts are often characterized as non-international armed conflicts. Whereas regulations related to international armed conflict allow the use of the right of visit and search which is longstanding and accepted as customary international law, this right does not exist in non-international armed conflicts. From an operational point of view, it is quite unsatisfying that existing rules related to the belligerent right of visit and search do not always fit current conflict in the sense that the means are not available to effectively act against non-state actors at sea. Possible legal solutions to what seems to be a gap have been suggested, through the

[615] Guilfoyle, 'Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters', C.R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), 83,-104, 84.

argument of a self-defence or NIAC right of visit. In this approach the legal basis for the actual boarding of the vessel is regulated by the *ius ad bellum* and the scope of the boarding authorities by NIAC-regulations or self-defence itself.

CHAPTER 10

The use of force in maritime interception operations

10. Introduction

This chapter addresses the use of force during maritime interception operations. To start with, the term 'use of force' can have different connotations. First, from a *ius ad bellum* perspective, it can have the meaning of the use of interstate *military* force which may or may not be in breach of Article 2(4) of the UN-Charter. Part of the *ius ad bellum* use of force issues, is the question what kind of force amounts to a breach of 2(4) UN-Charter and whether the force must be seen in the context of 2(4), or that it is in fact State's a legitimate use of force in pursuit of law enforcement activities at sea. The direction the answer has to take in this, as Nevill concludes; 'turns on an objective assessment of the State's intentions and the surrounding circumstances, not the gun or ammunition used, the number of shots fired, or the identity of the State authority…'[616] Another connotation of the use of force -which is the focus of this chapter- *is* in fact related to 'the ammunition used or the number of shots fired', namely the actual use of force itself: *How* must force be applied during maritime interception operations? This latter question relates to the relationship between using force during a MIO and applicable legal regimes that regulates such force. That is the question which is central to this chapter.

With regard to the legal regime on the use of force in maritime interception operations both the legal of human rights law and the law of armed

[616] P. Nevill,'Military sanctions enforcement in the absence of express authorization', in M. Weller (ed.), *The Oxford Handbook on the international law on the use of force* (2015), 272-292, at 282.

conflict play a role. Next to that also other legal frameworks, such as the international law of the sea play a role. These legal frameworks have their own particular perspectives and focus. As this chapter will underline, the law of the sea has in fact no specific use of force regulations, but has, through applying standards within human rights law to situations at sea, developed some guidance on the subject through case law, mainly along the lines of a focus on the use of force against vessels. Human rights law relates to the exercise of public power and use of force against individuals against the background of the right to life. The law of armed conflict comes into play when a situation of armed conflict arises in which force against both vessel and person is allowed, albeit limited by LOAC-regulations. As will also be discussed in this chapter, LOAC thereby significantly differs in concept on the use of force in relation to human rights. How these three legal frameworks interact with each other is a matter of debate. This debate relates both to the extraterritorial applicability of human rights law and the scope of its applicability in military operations. It also relates to the relationship between human rights and the law of armed conflict, which is a debate that has primarily emerged in land based military operations. Human rights law has, however, received increased attention in the maritime context, for example in relation to counter-piracy operations off the coast of Somalia and with regard to maritime border patrol operations in the context of dealing with refugees at sea.[617] UNCLOS does not deal with the application of human rights in the maritime dimension, although the rendering of assistance (Art. 98 UNCLOS) expresses a duty for a State aiming to protect the seafarer against the perils of the sea, and may arguably be seen as a human right obligation for States that stems directly from the international law of the sea.[618] The ECtHR in the *Hirsii Jamaa v. Italy* case has dealt with the relation between the duty to render assistance and the human rights principle of *non-refoulement*.[619] The relationship, however, between human rights and the law of the sea is an issue that has yet to further crystallize.[620] On this, Klein underlines the need to

[617] Such as the EU-operation FRONTEX, but also the individual actions of states, such as Italy in the Mediterranean Sea, that are confronted with the issue of refugees at sea.
[618] S. Cacciaguidi-fahy, 'The law of the sea and human rights', in *Panoptica Vitoria*, vol. 1, no. 9 (2007), 1-21.
[619] See also N. Klein, 'A case for harmonizing laws on maritime interception of irregular migrants', in *ICLQ*, vol. 63 (October 2014), 787-814.
[620] T. Treves, 'Human Rights and the Law of the Sea', in *Berkeley Journal of International Law*, vol. 28 no. 1 (2010), 1-13.

further harmonize the, as she calls it, 'fragmented legal frameworks applicable to maritime interception'.[621] This not only holds true for the interrelationship between the law of the sea and human rights, but also with regard to the relationship between human rights and the law of naval warfare. Whereas the discussion in the relationship between the law naval warfare and the international law of the sea since the adoption of UNCLOS III has now slowly moved to the background, there has been extensive debate covering the relationship between human rights law and the law of armed conflict in a general sense, little attention has been devoted to how this relationship would apply to the maritime context.

Various types of situations exist in which a necessity to use force in the maritime dimension can arise. These include the performance of law enforcement at sea, personal self-defence in response to unlawful assault, the execution of a UNSC-mandate and in the context of the right of national self-defence under Article 51 of the Charter.[622] In these situations, the actual application of force is regulated by applicable human rights law, by the international law of the sea and where relevant, the law of armed conflict.

With regard to term use of force in this chapter, as stated previously, it focuses on the question how and against whom or what force may be utilized. In the broadest sense, every form of coercion may be considered as a use of force. Also a boarding and visit of a foreign flagged vessel or detention of a person[623] may arguably be considered as a form of coercion as it impacts on the free will of the master of the vessel or the individual. This chapter will, however, define the use of force as the use of armed and potentially lethal force during an interception operation. In other words, when lethal weapons are used in the course of a maritime interception, what then are the conditions under which force can be applied?

[621] Klein (2014).
[622] See e.g. Rothwell & Stephens, 310; C.H. Allen, *International law for seagoing officers* (6th ed. Naval Institute Press, Annapolis Maryland, 2014), Chapter 13.
[623] See also Petrig (2014), 113-114 who states: Since arrest and detention of persons suspected of piracy or armed robbery at sea is a form of use of force going beyond self-defence and defence of others,…'.

10.1. Naval forces and the use of force

Before the legal aspects of the application of force in maritime interception operations are analysed, three preliminary comments will be made here on the use of force by naval forces in general.

Firstly, naval forces can be assigned several tasks within one military campaign, which, in terms of the use of force, can lead them to operate in both the lower and higher spectrum of using force within one and the same campaign. In the same campaign naval forces can, for instance, be assigned to conduct embargo operations against neutral shipping, while also providing naval gunfire support (NGS) to land operations. One such example is *Operation Desert Storm* in which naval forces were used to fire Tomahawk missiles at land targets in Iraq, while simultaneously enforcing the embargo, which is at the lower end of the use of force scale and directed against civilian vessels, and which were also potentially of a neutral status.[624] Another example is *Operation Unified Protector*, where some of the naval forces were both used to enforce the UN-mandated embargo and apply naval gunfire support to support the on-going air-campaign, the latter which was clearly a war-fighting activity as opposed to the maritime embargo operation, which was being conducted at the same time. A third example is OEF, in which naval forces supported land operations in Afghanistan from the sea and also sought for possible terrorists at sea. At the operational level, an organizational separation is usually made in which ships are assigned to a certain specific task. It is, however, not excluded that warships may quickly change from one tasking to another. Many factors will have a bearing on this decision, such as the capabilities of the available forces and geographical positioning, but also the limitations that States put on the conduct of their participating warships. Be that as it may, changes to the situation require the commander to change his mindset quickly from say the administration of force against suspect merchant vessel on one day, to attacking military targets on the next day.

Secondly, on a more tactical level the use of force can be directed against both the *vessel*, for instance to make the vessel stop, and the *persons* on board the vessel, for instance to take over control of the vessel or

[624] T. Benbow, 'Maritime power in the 1990-1991 Gulf war and the conflict in the Former-Yugoslavia', in A. Dorman, M. Lawrence Smith and M.R.H.Uttley, *The changing face of maritime power* (1999), 107-125.

arrest persons on board. The military actions against the persons on board the *Ibn Khaldoon*[625] and the *Mavi Marmara* are examples of the latter. The actions of the *Niels Ebbessen*[626] are an example of the former. While the international law of the sea and the law of naval warfare have primarily developed through focussing on force against vessels, human rights law focuses on persons.

Thirdly, the use of force can obviously be directed against military opponents, such as enemy warships or combatants, but also in the context of embargo enforcement or blockade, against civilian merchant vessels and persons on board those vessels. In fact, many of the naval operations which deal with economic warfare or the enforcement of economic sanctions are directed against civilian vessels and their crews and passengers, who may not have anything to do with the conflict.

10.2. International law of the sea

The international law of the sea is primarily meant to be peace time law and does not concern itself directly with military operations at sea. Also, no provisions of UNCLOS explicitly mentions any rule or guideline on how to use force during interception operations on the high seas, in either circumstances of peacetime or conflict.[627] Some provisions are seen as implicitly referencing to the use of force, such as Article 225 UNCLOS.[628] And others find implicit grounds for arguing that force at least can be used in the conduct of certain UNCLOS actions for the simple reason that for instance during an arrest of pirate-suspects under Article 105, one can as-

[625] The *Ibn Khaldoon* was a merchant vessel, dubbed the "peace-ship", which sailed in 1990 from Algeria to the port of Basra in Iraq during the MIF-period. The *Ibn Kaldoon*, similar as the *Mavi Marmara*, had protestors, congressmen and women on board and purposely attracted a lot of media attention. After helicopter insertion of the US boarding team passive resistance occurred by the passengers to try to stop the boarding team to take control of the vessel. After the boardingteam discovered prohibited items on board a port needed to be found to offload the prohibited cargo. Ultimately the cargo was offloaded in Oman. See http://articles.latimes.com/1990-12-26/news/mn-6714_1_peace-ship; Pokrant, 193-194.

[626] See on this incident later in this chapter.

[627] D.G. Stephens, 'The impact of the 1982 law of the sea convention on the conduct of peacetime naval/military operations', in *California western international Law Journal*, vol. 29, no. 2 (Spring 1999) , 283-311, at 292. Rothwell and Stephens (2010), 419.

[628] Art. 225 UNCLOS reads:

> In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.

sume that there is a chance they will resist.[629] The argument runs that without the possibility of force, such authorities would become in fact useless. Bono and Boelaert see this same implied use of force powers in Articles 110 and 111 UNCLOS.[630] Tullio Treves also argues that '[g]eneral international law, in authorising stopping and boarding for the purpose of exercising the right of visit under Article 110 of UNCLOS or the seizure of a pirate ship under Article 105, presupposes that force may be used to reach these objectives.'[631] By that as it may, there are no explicit powers for the use of force in UNCLOS itself.

Case law on the use of force within the context of the international law of the sea does, however, provide some guidelines. Such case law on the use of force in relation to the international law of the sea and maritime interception can be found in the *I'm Alone* (1929),[632] *Red Crusader* (1961),[633] *M/V Saiga, no. 2* (1999)[634] and the *Guyana v. Suriname* (2007)[635] cases. Notably, in the *MV Saiga*-case the Court held that in the

[629] See e.g. McLaughlin (2009), 80; R. Gosalbo-Bono, S. Boelaert, 'The European Union's comprehensive approach to combating piracy at sea: Legal aspects', in P. Koutrakos, A. Skordas, *The law and practice of piracy at sea: European and international perspectives* (2014), 81-167,103.
[630] Gosalbo-Bono and Boelaert (2014), 106-107.
[631] Treves (2009), 413.
[632] The Canadian flagged vessel *I'm Alone* was sunk in March 1929 in hot pursuit on the high seas in the Gulf of Mexico, by the US coast guard cutter *Dexter*, whilst it was engaged in prohibited liquor trafficking. On the question whether the sinking of the vessel was justified it was considered that:

> On the assumptions stated in the question, the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph eight of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention.

[633] Permanent Court of Arbitration (PCA), 23 March 1962. In 1961 the Danish fisheries inspection vessel *Niels Ebbessen* boarded the British flagged vessel *Red Crusader* and arrested the crew on suspicion of fishing within a prohibited area. After initially agreeing to follow the *Niels Ebbessen* to the Faroe Islands, it stopped cooperating to follow the *Ebbesen* and secluded the Danish officers that were still on board. The *Ebbessen* than first fired warning shots upon the Red Crusader, hailed it to stop and then proceeded to fire for effect at the *Red Crusader*. The commission concluded that firing upon the *Red Crusader* was not justified and that other means should have been sought to pursue arrest.
[634] *MV Saiga no. 2, Saint Vincent and the Grenadines vs. Guinea*, ITLOS judgment 1 July 1999. The oil tanker *MV Saiga* was attacked and boarded by Guinean officials in 1997. The vessel and persons were brought to Conakry and placed under arrest. The ITOs found that Guinea under the specific circumstances of the case used excessive force against the *MV Saiga*, which was fully loaded with fuel, was unarmed and travelling at a speed of 10 knots. See para's 158-159.
[635] *Guyana vs. Suriname*, Award of the Arbitral tribunal constituted pursuant to article 287, and in accordance with annex vii, of the United Nations Convention on the Law of the Sea, 17 September 2007. The underlying issue in this case was a border dispute between the two neighboring States. The case emerged from an incident in 2000 in which Suriname threatened to use force by means of two gunboats of the Suriname Navy to expel the vessel *C.E. Thornton* from the disputed area which was in service of Guyana.

course of stopping a vessel first visual internationally recognized signals must be given to stop the vessel, and when this does not succeed, a variety of other measures can be taken, including the firing of warning shots across the bow. When all this fails, the pursuing vessel may, as a last resort, use force. But even then, appropriate warnings must be given and efforts should be made to ensure that life is not endangered.[636] International law of the sea case law provides that once there is a legal basis to stop and board a vessel, reasonable, necessary and last resort force that ensures that life is not endangered on board the vessel is thus authorized.

The use of force in these cases is force used in the context of constabulary purposes, in the pursuit of legitimate law enforcement actions which is considered to be outside the prohibition of the use of force under Article 2 (4) of the UN-Charter. The legality of the use of force in law enforcement action by a State on the high seas against foreign flagged vessels is, therefore, not considered through the *ius ad bellum*.[637] Guifloyle supports this view by stating that use of force against a foreign (merchant) vessel is not force against the political or territorial integrity of a State.[638] Obviously, other factors matter in this debate, such as to what the degree the State itself is involved in for instance protecting the vessel (e.g. convoys with warships) or in its relationship with the vessel (e.g. contractual governmental task), or that a State to State dispute comes is fought over through merchant vessels (e.g. protecting territorial integrity). How thin the line between enforcing rights based on law enforcement activities and the use of force in contravention with the use of force prohibition of Article 2 (4) UN-Charter is, is shown by the Tribunal in the *Guyana-Suriname* case. In this case:

> The Tribunal accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary. However in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity. This Tribunal has based this finding primarily on the testimony of witnesses to the incident, in particular the testimony of Messrs Netterville and Barber. Suri-

[636] *MV Saiga* no. 2, para. 155.
[637] See also Papastavridis, 69-70.
[638] Guilfoyle (2009), 273.

> name's action therefore constituted a threat of the use of force in contravention of the Convention, the UN Charter and general international law.[639]

10.2.1. International agreements on the law of the sea

The principle that force may be used in law enforcement activities at sea provided that such force is unavoidable, reasonable and necessary, is also codified in different agreements that are related to the law of the sea. For instance, the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, states in Article 22 paragraph 1(f) that:

> 1. The inspecting State shall ensure that its duly authorized inspectors: ... (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

Also, the SUA-Protocol has a provision on the use of force which, interestingly, also focuses on the use of force on board the vessel. Article 8*bis* sub 9 of the SUA-Protocol states that, apart from the general notice that any force shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances, force shall be avoided except when necessary *to ensure the safety of its officials and persons on board, or when the officials are obstructed in the execution of the authorized actions*. The latter condition might apply when a vessel is not compliant with orders to stop and no other means are available to stop the vessel. Once on board, the officials need to avoid any use force during their activities unless to ensure their safety and those of the persons on board. The bilateral shipboarding agreements between the US and other States also contain a provision on the use of force. The agreement between Belize and the US, for instance, states that:

> 2. Each Party shall avoid the use of force except when and to the degree necessary to ensure the safety of Security Force Officials and ships, and of persons on board the suspect ship, and where Security Force Officials are obstructed in the execution of their duties.

[639] *Guyana-Suriname*, paragraph 445.

3. Only that force reasonably necessary under the circumstances may be used.
4. Boarding and search teams and Security Force ships have the inherent right to use all available means to apply that force reasonably necessary to defend themselves or others from physical harm.[640]

Although outside the scope of this thesis, it is worth mentioning here that the *Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area* **(***San Jose Treaty)*,[641] also has codified the use of force against both vessel and persons that detail the same conditions.[642] The point to underline here, however, is that when an international agreement on a specific subject exists, it may have a specific provision on the use of force. Those provisions can deal with the use of force, both against the vessel and the persons on board. The scope of these international agreements are usually aiming at law enforcement activities, during the course

[640] See Article 9 of the *Agreement Between the Government of the United States of America and the Government of Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea*, October 2005. The US-Croatia agreement (2005), for example, mentions words alike. Article 9 states:

1. Rules. When carrying out the authorized actions under this Agreement, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this Agreement shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

2. Self-defense. Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by Security Force or other officials of either Party.

[641] *Agreement concerning co-operation in suppressing illicit maritime and air trafficking in narcotic drugs and psychotropic substances in the Caribbean area*, San Jose, 10 April 2003.

[642] See Article 22 of the *San Jose Treaty*, which reads:

1. Force may only be used if no other feasible means of resolving the situation can be applied.
2. Any force used shall be proportional to the objective for which it is employed.
3. All use of force pursuant to this Agreement shall in all cases be the minimum reasonably necessary under the circumstances.
4. A warning shall be issued prior to any use of force except when force is being used in self-defence.
5. In the event that the use of force is authorised and necessary in the waters of a Party, law enforcement officials shall respect the laws of that Party.
6. In the event that the use of force is authorised and necessary during a boarding and search seaward of the territorial sea of any Party, the law enforcement officials shall comply with their domestic laws and procedures and the directions of the flag State.
7. The discharge of firearms against or on a suspect vessel shall be reported as soon as practicable to the flag State Party.
8. Parties shall not use force against civil aircraft in flight.
9. The use of force in reprisal or as punishment is prohibited.
10. Nothing in this Agreement shall impair the exercise of the inherent right of self-defence by law enforcement or other officials of any Party.

of which persons may be arrested, and which go beyond the use of force in personal self-defence.

In sum, three points can be noted on the use of force from a law of the sea perspective. First, the UNCLOS-treaty does not contain explicit rules on the use of force. Through case law it is, however, accepted that the use of force under strict conditions is allowed in the pursuit of lawful law enforcement activities at sea by a State. Furthermore, and secondly, in specific agreements related to law enforcement at sea provisions exist that regulate the use of force. Case law seems to have been developed via the route in which the rules on the use of force has emerged in the context of the use of force during law enforcement activities against vessels, and not against persons directly. Persons, however, are part of the proportionality consideration to use force against the vessel. The regulations in agreements related to the law of the sea have added a person-focused part to using force. And third, which may be most important note to underline, is that, essentially, what happens in the case law and agreements is in fact the application of human rights law standards on the use of force in the maritime context. As human rights law has, however, always been regarded to apply within the territory of a State, the use of force in these circumstances at sea were never set within realm of human rights law. As extra-territorial applicability of human rights law is today a generally accepted legal concept, it may now, arguably, be more correct to State that the legal regime for the use of force at sea is not derived from the international law of the sea itself, but from human rights law that is applied in the maritime context. Equally, international agreements that contain provisions on the use of force during a boarding operation, ultimately apply human rights law standards, rather than standards that are derived from the international law of the sea itself.

10.3. Applicability of human rights to high seas interceptions

During the early stages of maritime interception operations human rights law was not as developed or relevant to such operations as it is today. One reason for this may be because of the fact the maritime embargo operations after the Cold War were focused on goods rather on persons. The ‘early writers’ on MIO, such as Fielding and Politakis, did not consider

human rights as a possibly applicable legal regime in the context of maritime interception operations. Nowadays, MIO are more and more conducted within the context of extraterritorial law enforcement operations on the high seas, in which persons have come more to the foreground of attention. And when individuals become involved, human rights become important. To illustrate, SC-Res. 1973 uniquely embargoed both goods and certain persons (mercenaries)[643] and counter-piracy operations have firmly stressed the fact that IHRL is an important legal regime to consider. Another reason for the rise of the importance of human right in military operations is obviously the above mentioned continuously growing acceptance that human right apply also extraterritorially. The naval dimension is certainly not excluded from this trend. In 1992, Captain Lyon (Royal Navy), for instance, still considered the possibility of the use of force during the MIF MIO against persons and the jurisdictional issues that may rise from that action mainly from an international law of the sea perspective and did not consider that the UK might have had jurisdiction based on human rights law.[644] Today, this question would immediately be analysed primarily from a human rights perspective.

With regard to applicability of human right in interceptions outside the sovereign waters of a State, we jump immediately to the issue of extraterritorial application of human rights. The applicability of IHRL centralizes around the question whether a State has jurisdiction over persons. From a European perspective, Article 1 ECHR states that:

> *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [Section I of] this Convention*.

Equally, the *International Convention on Civil and Political Rights* (ICCPR) centralises around the threshold of 'jurisdiction' for the application of human rights.[645] Against the background of the growing acceptance that -still in an exceptional fashion- jurisdiction exists extraterritorially on the high seas, the applicability of IHRL can thus be established in two ways. First, because flag States have exclusive jurisdiction over their flagged

[643] SC-Res. 1973 (2011), paragraph 13.
[644] Lyons, 163-164.
[645] See Article 2 (1) ICCPR. The relevant part states:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,…

vessels, it follows that IHRL applies on board their flagged vessel, including an intercepting warship. Second, a State has extraterritorial jurisdiction based on factual situation of the circumstances at the time. The case law on extraterritorial application of IHRL is extensive and developing and centers around the notion of *effective control*. If in case a State has effective control over a person (also known as state agent authority - SAA) or an area (known as effective control over an area – ECA), there may be grounds to conclude that a jurisdictional link is established between the person and that State, which allows human rights law to be applicable in the relation between the acting State and the individual. ECA exists when, as a consequence of military action a State exercises effective control of an area outside its national territory.[646] 'The obligation to secure, in such an area, the rights and freedoms set out in the convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration'. SAA refers to the situation where a State can be held accountable for violations of human rights when persons are outside the territory of a State, but under the authority and control of its agents.[647] It does not matter whether there is a legitimate legal basis which underpins the action. Human rights law may, for example, apply also where a State did not have the consent of a flag State where it should have and has acted against the persons on board that vessel.

The State's actions through the use of their warships and crews make it possible that human rights apply in the area of the high seas. Because international[648] and national[649] case law has dealt with the matter of application of IHRL on the high seas, this is rather undisputed. As Papastavridis mentions after the *Medvedyev*-judgment; 'Hence, the Medvedyev case comes to complement the above decisions and provide cogency to the ar-

[646] ECtHR, *Loizidou v. Turkey*, application no. 40/1993/435/514, (Preliminary objections), 23 March 1995. Paragraph 62 reads as follows:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

[647] See on these two notions of establishing extra-territorial jurisdiction in M. Milanovic,'Al Skeini and Al-Jedda in Strasbourg', in *EJIL*, vol. 23, no. 1 (2012), 121-139.

[648] E.g. *Medvedyev v. France, Hirsi Jamaa v Italy, Rigopoulos v. Spain, Xhavara v. Albania*.

[649] E.g. counter-piracy cases.

gument that the Convention applies on the high seas, in so far as control, and therefore, jurisdiction is exerted by organs of the States parties.'[650] Also, apart from the threshold question, the UNSC has underlined in its resolutions in the case of counter-piracy[651] and with respect to the Libya MIO in SC-Res. 2146 (2014) that measures shall be undertaken in accordance with human rights law.[652] The Council does not state that every action taken during counter-piracy operations will meet the conditions for extra-territorial application of human rights law, but the Council requires actions to be in accordance with human rights law by stating that measures shall be undertaken in such a manner. With regard to the latter, more generally, the question of which legal regime is applied during the use of force by the boarding team is a question of within which legal paradigm -IHRL or LOAC- the action will fall. With regard to the threshold question of applicability of human rights law on the high seas, if one would divide a maritime interception into phases, broadly speaking a distinction can be made between 1) the phase that leads up to boarding the vessel, 2) the phase of being on board the vessel, and 3) a possible phase of bringing persons on board the warship.[653] These three phases will be discussed below.

10.3.1.Human rights and the use of force whilst approaching target vessel

Do human rights already apply at the stage in which the warship commander is using force against a vessel to persuade it to stop the vessel? In the *Xhavara v. Italy and Albania* case,[654] in which during the boarding procedure of the Albanian flagged *Kater I rader* carrying Albanian refu-

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[650] E. Papastavridis, 'European court of human rights Medvedyev et al v France (Grand Chamber, application no 3394/03) judgment of 29 March 2010', in *ICLQ*, vol. 59, Issue 03 (2010), 867-882, 871.

[651] See e.g. SC-Res. 2077, para. 17.

[652] Paragraph 5 of SC-Res. 2146 (2014) reads:

> 5. Authorizes Member States to inspect on the high seas vessels designated by the Committee pursuant to paragraph 11, and authorizes Member States to use all measures commensurate to the specific circumstances, in full compliance with international humanitarian law and international human rights law, as may be applicable, to carry out such inspections and direct the vessel to take appropriate actions to return the crude oil, with the consent of and in coordination with the Government of Libya, to Libya;

[653] Petrig identifies two phases :The question of application of human rights on board the warship and application 'beyond its railing'. A. Petrig, 'Human rights in counter-piracy operations: No legal vacuum but legal uncertainty', in M.Q Mejia, jr., et al (eds.), *Piracy at sea, WMU Studies in Maritime Affairs*, no. 2 (Heidelberg, 2013), 31-45, at 36.

[654] ECtHR, *Xhavara and others v. Italy and Albania appl. no 39473/98,* 11 Janvier 2011

gees by the Italian warship *Sibilia* the ships collided and caused the Albanian vessel to sink, a plea of Article 2 ECHR was brought before the court. However, the Court held that the grief was held inadmissible because at that stage not all local remedies were exhausted.[655] This case unfortunately for the academic question involved provided, therefore, no answer. In the *Women on Waves v. Portugal* case, however, the Court applied human rights -in this case Articles 10 and 11 ECHR- to be applicable even when the (Netherlands flagged) vessel *Borndiep* was not boarded.[656] In 2004, the *Borndiep* was not allowed into Portuguese territorial waters. Warships were sent to obstruct the passage into the territorial waters of Portugal. Arguably, here Portuguese warships exercised public authority over the vessel, by prohibiting it to sail its intended course and denying access to Portuguese territorial waters.

Papastavridis stated with reference to the *Al Skeini*-judgment which held that effective control requires exercise of physical powers and control over the person, "it seems difficult to sustain that anything less than actual physical interference or by boarding, would trigger the extra-territorial application of the ECHR".[657] A broader approach than actual physical control, but rather already through military presence, would be to accept that human right would apply when a State exercises public authority over persons and objects. Consequently, this threshold would widen the application of human rights in the context of maritime interception operations to include a situation in which there is not yet physical control of persons and objects, but the State has started to exercise its public authority. In other words, before the boarding and physical control of the vessel and persons on board has occurred, human rights law would start to apply.

Another way to approach the applicability of human rights in the context of approaching vessels by warships, or vessels in the vicinity of individuals not being on board of the warship itself, is via the concept of effective control over an area (ECA). The ECA concept in this maritime context aims, rather than effective control over the individuals themselves, to see whether there may be a jurisdictional link on the basis of the idea that a warship (or a fleet) has effective control over a maritime area. This ap-

[655] *Xhavara and others v. Italy*, p. 8.
[656] *Women on Waves and others v. Portugal*, (appl. no. 31276/05), 3 February 2009. In 2004, the *Borndiep* was not allowed into Portuguese territorial waters. Warships were send to obstruct the passage into the territorial waters of Portugal.
[657] Papastavridis (2013), 126.

proach is advocated by Petrig who seems to have taken on board the idea that a group of warships may have control over an operational area. She mentions that; *it could be argued that effective territorial control cannot only be established within the (geographically changing) operational radius of an individual military ship, but even over a joint operational area by the entirety of ships and aircraft deployed*.[658] She then proceeds to take the Internationally Recommended Transit Corridor (IRTC) to be an example of such control. Assuming that at sea a certain degree of control of sea areas may indeed be established, the level of control in that area varies with the type, purpose and conditions within the area. Arguably, when area the is smaller, such as an area of amphibious operations (AOA) off the coast of another State, control may be assumed faster than within an general (and larger) area of operations (AOO).[659] If one would follow this reasoning to establish applicability of human rights law, it should be recalled that from an operational perspective, the operational areas may be enormous and the military assets may be few. In which case it would take days arrive at any incident. From this perspective, it would seem very difficult to readily accept that effective control exists within such an operational area at sea. Put differently, establishing an operational area does not automatically indicate that naval forces will have control over it. And consequently, one should not automatically conclude that effective control necessarily exists simply on such a basis.

10.3.2. Human rights and the use of force on board foreign flagged target vessel

With regard to the second phase, both Papastavridis and Guilfoyle take the view that the mere presence of an armed boarding party on board a foreign flagged vessel would satisfy the condition of effective control.[660] With regard to captured pirate-suspects on board a small pirate *dinghy*[661] that could very much be the case. But in the context of a huge container vessel, it may, however, be less easy to readily accept this view. In the *Al Skeini*-case the ECtHR stated:

[658] Petrig (2013), 39-41.
[659] The theatre of operations (TOO) is the widest operations area, then the AOO, and then smaller specific area can be assigned, such as an AOA.
[660] Papastavridis (2013),76; Guilfoyle (2009), 268.
[661] A small motor boot.

> 'The Court does not consider that jurisdiction [in the above cases] arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.[662]

Effective control should not automatically be assumed solely on the basis that a boarding party is inserted on a foreign flagged vessel. In the case of an opposed boarding with substantial armed resistance, outside the situation of an armed conflict, the human rights law paradigm applies. In terms of the question whether extraterritorial jurisdiction exists, one has to question whether effective control of the vessel or persons on board in fact exists during the phase of the boarding where there is armed resistance. In any case, in line with from the Court's view as stated above, the mere fact that a boarding party is on board a vessel does not automatically mean that it has effective control over the vessel or persons. In cases of friendly approaches, for instance, where the boarding party is invited on board and engages solely in general and friendly communication with crew of the vessel, there may be no actual exercise of public authority. That it is very possible that jurisdiction can exist whilst being on board a foreign flagged vessel, is underlined by the *Medvedyev*-case, in which the ECtHR considered that jurisdiction ex Article 1 ECHR existed because the French boarding team was obliged to use their weapons to defend themselves, kept the crew under guard in their cabins and rerouted and towed the *Winner* into the Port of Brest, all under orders of the French authorities. The Court therefore concluded that France had jurisdiction, at least *de facto*, from the moment of interception until the persons were tried.[663]

10.3.3. Human rights law application on board warships

With regard to the latter phase, case law is quite clear on the matter. Most recently, the ECtHR in the *Hirsi*-case underlined in the latter phase that persons brought on board the warship are under *de jure* and *de facto* control of the authorities of that State.[664] Earlier, in the *Bankovic*-case, the Court held that jurisdiction of a State exists on board crafts and vessels

[662] ECtHR, *Al-Skeini and others v. The United Kingdom* (application no. 55721/07,) judgment, 7 July 2011, paragraph 136.
[663] Medvedyev, para 66-67.
[664] *Hirsi Jamaa*, para. 81-82.

registered in, or flying the flag of, that State.[665] National court cases, in particular with the procedural rights, with regard to piracy also do not dismiss that IHRL apply when the suspects are brought on board the warship.[666] Once persons have been brought on board a warship, there is no doubt that IHRL applies to these individuals.

10.4. Normative requirements of applying force under human rights law

If international human rights law applies during maritime interception, the next step is to consider the substantive law on the use of force within the context of human rights law. Requirements for the use of force under international human rights are dealt with through the human right of the right to life. In the *European Convention on Human Rights* (ECHR), Article 2 ECHR has codified the right to life.[667] In the ICCPR the right to life is codified in Article 6.[668]

Which conditions apply to the military when using force in relation to the right to life under human rights law, has been extensively discussed, inter alia by Nils Melzer,[669] Louise Doswald-Beck[670] and Eric Pouw.[671] In essence, the general conditions for the use of force in the context of the right to life may be summarized by five requirements: The requirement of an adequate legislative framework, necessity, proportionality, precaution and investigation. The first requirement in essence obliges a State to have a legal framework for the use of force, train personnel and adequately plan

[665] ECtHR, *Bankovic vs Belgium et all*., appl. No. 52207/09, Decision Grand Chamber, 21 December 2001, para 73.
[666] For instance, in the Netherlands court case on the pirated vessel *MS Samanyolu*, it was never disputed that human rights applied on board the Danish warship *Absalon*. The District Court of Rotterdam held that the prolonged detention on board the *Absalon* was a breach of Article 5(1) ECHR, but did not see it as a breach by the State of the Netherlands.
[667] Article 2 (1) ECHR states:
> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

[668] Article 6(1) ICCPR states:
> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

[669] N. Melzer, *Targeted killings in international law* (2006).
[670] L. Doswald-Beck, *Human rights in times of conflict and terrorism* (Oxford University Press, 2011)
[671] E. Pouw, *International human rights law and the law of armed conflict in the context of counterinsurgency* (2013).

for operations.[672] The second requirement (necessity) obliges States to only use force only in circumstances when it is absolutely required to achieve the legitimate objective. The threat must be such that the use of lethal force must be unavoidable under the circumstances of the case and the use of force is strictly limited to achieve the legitimate objective. Within the context of this requirement the use of force is also limited to the *actual* moment when the threat is manifestly concrete and specific. With regard to the third requirement (proportionality) Pouw states that when the nature and scale of the threat does not outweigh the harm or injury to life resulting from the use of force applied in support of a legitimate aim, the deprivation of life violates the right to life.[673] The fourth requirement (precaution) obliges a State to take precaution throughout the whole process of the planning, execution and aftermath of the action. The requirement of precaution obliges the State to plan, organize and control the operation with a view towards restricting the use of lethal force, to the greatest extent possible.[674] The fifth requirement (investigation) means that a State has a duty to conduct an independent and impartial investigation in every instance of potential deprivation of life that can be attributed to a State.

10.4.1. The right to life in a naval operations dimension

At this stage, there is no case law from the European Court of Human Rights that has dealt with the right to life at sea.[675] The only case that came close was the *Xhavara*-case, but, as mention earlier, which was not admissible to the Court. No substantive views on the application of the right to life in the maritime environment have therefore emerged from its decisions to date. Nevertheless, the above mentioned five requirements exist in every situation where government officials (military) are required to use force to achieve their legitimate objectives. The requirements mentioned above clearly do not limit themselves to the actual moment of the use of the force, but cover a wide range of obligations and conditions related to the use of force before and after using the lethal means itself. The question within the context of MIO is whether the use of force under hu-

[672] Doswald-Beck (2014), 165-167.
[673] Pouw (2013), 245.
[674] Pouw (2013), 247.
[675] Papastavridis (2013), 126-130.

man rights law may be any different in the maritime context than the application of force outside the maritime dimension. As a point of departure it is safe to say that the maritime environment does not change anything in relation to the requirements. If differences exist, they must be sought in the practical application of these requirements. Operating in the maritime environment may involve practical issues that could lead to a different interpretation of the requirements at sea.

One of the challenges in terms of adequate legal framework may be that, although international agreements may give warship commanders the authority to act, naval personnel need to be given law enforcement authority to act through domestic law in such a way that naval personnel can lawfully perform law enforcement activities. The maritime environment may also have an impact on the feasible precautions requirement. What is feasible at sea may be quite different than in a normal law enforcement scenario on land. For example, an interception at sea involving the use of force can occur hours or even days away from supporting elements, such as sufficient medical facilities, and will depend on the location of the target vessel. Hence, the fact is that the maritime environment will often signify that fewer supporting resources are immediately available than in the land environment. With regard to proportionality, the circumstances of the case may lead to the decision not to board at sea when the vessel will ultimately sail into port and where the port authorities can be requested to inspect the vessel and take relevant actions. This must also be seen in the context of the fact that fewer means are available at sea for the application of precautionary measures. Furthermore, practical challenges may arise relating to investigations after the use of force on a foreign flagged vessel with regard to the ability to investigate. When an intervention on a foreign flagged vessel occurs and there would be reason to conduct an investigation, more States would be involved which could lead to more coordination efforts during such investigation.

10.4.2. Counter-piracy operations off the coast of Somalia

Piracy is a crime subject to universal jurisdiction under UNCLOS and customary law. By its nature, therefore, it is subject to the law enforcement standards of human rights law. In the particular case of piracy off the coast of Somalia, the UNSC has adopted *all necessary means* in relation

to act against piracy in the Somali territorial sea. The general understanding of the phrase is that it authorizes the use of military force.[676] It does not, however, also provide a separate legal regime to use force. As mentioned in previous chapters, although the counter-piracy resolutions use the phrase *all necessary means*, the given authorities are limited by the fact that action has to be in accordance with relevant international law, which in this case are UNCLOS and human rights law. Guilfoyle, Blank and others have sufficiently argued that counter-piracy operations are not military operations that are conducted under the regime of the law of armed conflict.[677] The phrase *all necessary means* by itself also does not, as Guilfoyle mentions, 'necessarily implicate IHL, which is applicable only in an international or non-international armed conflict'.[678] The use of force by naval forces in counter-piracy operations is, therefore, firstly force used in the legitimate pursuit of a law enforcement action. Naval personnel can be assigned a law enforcement task to take actions against piracy.[679] The limits on the use of force are the limits posed on law enforcement actions.[680] These law enforcement actions go beyond the situation of personal self-defence and have the purpose to affect police action of an arrest of a criminal suspect. The function of counter-piracy operations, to quote Guilfoyle again, 'is clearly a constabulary one: it is the

[676] See SC-Res. 1816 (2008). The resolution, in operative paragraph 7, states:

> 7. Decides that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General, may:
>
> (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
>
> (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;

See also, EU Council joint action 2008/851/CFSP, 10 November 2008 in which the EU underlined this authority in its mandate. Article 2d states:

> (d) take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present;

[677] Guilfoyle (2010(c)); L.R. Blank, 'Rules of engagement and legal frameworks for multinational counter-piracy operations', in *Case Western Reserve Journal of International Law*, vol. 46 (2013), 397-409.

[678] Guilfoyle (2015), 1062.

[679] It is apt to quote a phrase coined by Craig Allen in this context, who stated: 'It is the mission, not the uniform worn by the actor, that determines how force should be classified and which doctrine controls that use of force'. See Allen (2006), 82.

[680] Treves (2009),412-414.

power to arrest suspects and bring them to trial, one which necessarily carries with it an authorisation to use force'.[681] During these actions fire can is sometimes directed against military personnel, which can trigger the right of personal self-defence, of which its legal parameters are defined by domestic laws. In November 2008, British Royal Marine Commando's from *HMS Cumberland* approaching a Yemen-flagged dhow, believed to be attacking the Danish merchant vessel *MV Powerful*, in rhibs shot two pirate-suspects when they were fired upon from a dhow.[682] In another instance in 2009, Netherlands Royal Marines from *Hr. Ms. Tromp* in a rhib got fired upon when approaching a dhow that also held Iranian hostages. Their reaction led to the death of two hostage takers.[683] Secondly, Bono and Boelaert pose the view that the phrase *all necessary means* important in light of the different activities with regard to defending against piracy which may go beyond the strict action of arresting pirates during a law enforcement actions.[684] Examples they mention are escorting or convoying vessels with warships or armed personnel on board the vessel. Although how force must be applied is still within the realm of human rights, the legal ground for the use force would arguably be based on the authority of the resolution. The difference with using force in personal self-defence would be that in such case there is no duty to try to escape from the danger. Zwanenburg, discussing the use of force for Dutch VPD's on board escorted vessels which are not part of the UN-resolution based operations, has therefore argued that vessels being attacked by pirates must first try to escape from the attack before any necessity for the VPD exists to act in self-defence.[685] Obviously, the factual circumstances of the case, however, will influence whether this may be the manner in which way the element of necessity in self-defence must be operationally translated.

[681] Guilfoyle (2010c), 10.
[682] http://www.theguardian.com/world/2008/nov/13/pirates-killed-gulf-aden.
[683] *Al Feddah*-case. District Court of Rotterdam, 12 October 2012.
[684] Gosalbo-Bono and Boelaert (2014), 109-110.
[685] M.C. Zwanenburg, Enkele juridische aspecten van militaire beveiligingsteams aan boord van koopvaardijschepen (Vessel protection Detachments)', in *MRT* , vol. 107, no. 6 (2014), 205-218, 210-212.

10.5. The law of armed conflict

Maritime interception operations may also be conducted in the context of an international armed conflict. In the context of the use of force, a number of essential conceptual differences exist between the LOAC and IHRL legal regime. In essence, whereas LOAC is a legal regime that centralizes around the rules to use force, the rules on the use of force in IHRL are implied or derived from different substantial rules, such as the right to life, for which States have an obligation to ensure and secure. IHRL is meant to protect the individual against government actions, whereas LOAC concentrates on the balance between the principles military necessity and humanity. The general concept therefore of the use of force within LOAC can be described as that force is generally allowed but bound by the rules of LOAC. Within the context of LOAC not every individual is protected against the use of force. The general concept of IHRL, however, is that force cannot be used as a legal principle and must be considered as an *ultimum remedium.* This point results in the general view that under IHRL actions of a State should be focused on arrest, rather than killing the person.[686] Another conceptual difference is that the purpose of LOAC is that it is meant to operate within the complex circumstances of conflict. This leads to provisions that have open norms and puts the efforts at what a commander knows or should have known at the time he was about to use force. IHRL is meant to operate under peacetime circumstances and is judged also by its effects after the use of force rather than by the circumstances at the time the commander made the decision. The use of force in LOAC and IHRL are, therefore, conceptually based on opposite ideas. Clearly, whether force is used under the legal regime of LOAC or IHRL, therefore, does make much difference. Both legal regimes have their own conditions of application, which means that the question needs to be considered separately for both regimes. Moreover, it could also result in the conclusion that both apply. Indeed, the more generally accepted view is that IHRL continues to apply during armed conflict.[687]

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[686] C. Droege, 'Elective Affinities? Human rights and humanitarian law', in *IRRC*, vol. 90, issue 871 (2008), 501-548, p. 525.

[687] Contrary views also exist, namely, the separatist-approach. This approach contains the view that LOAC applies during armed conflict and IHRL applies during peacetime circumstances. See on these approaches T.D. Gill, 'Some thoughts on the relationship between international humanitarian law and international human rights law: a plea for mutual respect and a common sense approach', in Y. Haek, B. McGonigle Leyh, C. Burbano-Herrera & D. Contreras-Garduño (eds.), *The realisation of human rights: when theory meets practice: studies in honour of Leo Zwaak* (Cambridge, 2014), 335-350.

Whether the law of armed conflict applies depends on either the situation in which a State has declared war or when armed conflict exists.[688] The applicability of the LOAC today, therefore, centralizes primarily around the term 'armed conflict'. This is a factual term which is not further defined in LOAC-treaties. Jurisprudence has given some tools to define whether or not an armed conflict exists.[689] The well-known *Tadic*-formula provides that an armed conflict exists when there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed ground, or between such groups with the States[690]. With regard to the existence of non-international armed conflicts, jurisprudence has developed some more indicative factors to be considered, such as the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used and the number and calibre of munitions fired, against which the intensity of the violence and the ability to resort to protracted armed violence must be considered.[691] The essence, however, is that the factual existence of an armed conflict is the threshold for application of the law of armed conflict.

Obviously, the law of armed conflict is of importance in relation to the use of force and maritime interception. That part of the LOAC which deals with hostilities will apply in military operations against the enemy opponent during conflicts at sea and is essentially guided by the fundamental principles of humanity, necessity, distinction, proportionality and chivalry. But apart from the law that regulates the conduct of hostilities, of par-

[688] See Common Article 2 of the Geneva Conventions.
[689] R. Bartels, 'Gewapend conflict is geen eenduidig begrip', in *Internationaal recht in de kijker* (2008), 69-81.
[690] E.g. *Prosecutor v. Dusko Tadic*, IT-94-1, 2 October 1995, para 70.
[691] The Trial Chamber of the ICTY in its judgment of 3 April 2008 in the Haradinaj-case noted (para. 49):

> 49. The criterion of protracted armed violence has therefore been interpreted in practice, including by the Tadić Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration. Trial Chambers have relied on indicative factors relevant for assessing the "intensity" criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.

ticular importance to maritime interception is a specialized part of LOAC applicable to international conflict at sea: the law of naval warfare. This legal regime, while based on the same fundamental principles underlying LOAC, it is a specialized legal regime, which is already touched upon in Chapter 9, not only regulates hostilities between belligerent naval and aerial forces at sea during an international armed conflict, but also contains rules relating to economic warfare, maritime neutrality, particular means and methods of naval warfare (such as blockade and the use of naval mines), prize law as well as issues, such as the protection of the sick and shipwrecked at sea and the use of hospital ships.

For the purpose the analysing the use of force within the legal regime of LOAC, conceptually, it is important to underline that many of the provisions of the law of naval warfare deal with operations that involve dealing with civilians rather than operations that are solely directed against the military forces of the opponent. The use of force in the naval dimension and within the context of the legal regime of LOAC thus has two main prongs: One is the use of force against enemy warships, the other is the use of force in relation to action directed against civilian merchant shipping. Whereas the land-dimension of the law on targeting basically has distinction and the rule of direct participation to hostilities as its essential guiding principles, the law of naval warfare, although guided by the same principles, contain an extra legal framework that details under which circumstances force can be used against civilian merchant shipping. Important also, is that these regulations focus mainly on *shipping*, and not on persons.

Because the law of naval warfare is a part of LOAC, the applicability of it follows the same conditions. One major difference, however, is that the law of naval warfare is viewed not to be applicable in non-international armed conflicts.[692] As Chapter 9 has already commented on this point, I will only mention here that whereas the protective part of the LOAC has not ceased to develop and is under constant discussion to ensure apt application in modern conflict, often characterized as NIAC's, in the maritime dimension this has not been given much serious attention. Yet, naval forces are certainly not unused in current NIAC-conflicts. Whereas the overall LOAC framework of obligations and principles with

[692] Von Heinegg (2010), Chapter 19.

regard to the use of force apply in maritime operations during a NIAC, the specific rules of the law of naval warfare, in particular the rules relating to economic warfare and maritime neutrality which are confined to IAC's, do not apply in a NIAC.

10.5.1. Use of force against neutral and enemy merchant vessels

As underlined above, it must firstly be underlined that force can be used against military *and*, under certain conditions, against civilian shipping. In that sense, a separation can be made between the use of force against vessels that are considered to be military objectives or are subject to attack. The obvious example of a military objective is an enemy warship. The use of force against an enemy warship is regulated by the targeting-rules. Although nowadays extremely unlikely, situations may exist where enemy warships are boarded and ultimately taken as booty. If the maximum authority of directly attacking the vessel on sight is lawful, the lesser means of boarding and capturing the vessel would also fall within the lawful scope of actions.

More complex, however, within the context of military objective are the rules that apply when force may be used against neutral or enemy civilian merchant vessels. Enemy or neutral merchant shipping can under certain conditions also be subject to attack. As mentioned, the fundamental principle with regard to the use of force in LOAC starts with that distinction must be made between persons that take part in hostilities and persons that don't. The latter are protected against the use of force. Interestingly, many of the instruments available to a State under the law of naval warfare involve not just the opponent, but rather focus on other users of the sea against which, under specific circumstances, force can be used. These other users are civilian merchant shipping ('civilian' and 'merchant' may be considered as in fact the same thing, but for the purpose of underlining its character both terms are used). The law of naval warfare specifies under what conditions force may be used against civilian merchant shipping. These can be either neutral or enemy, but the essence is that they are civilian in nature.

10.5.1.1. The merchant vessel as a legitimate military target

In 1991, William Fenrick wrote that the question of when a merchant vessel can be considered a military target as one of the most unsettled questions of modern naval warfare.[693] His arguments as to why it is difficult lie mainly in the way naval warfare has developed through history. Although there is general agreement on the legal point of departure that merchant vessels cannot be attacked, one of the difficulties is that distinction between naval forces and civilian shipping has in history been blurred by incorporating the merchant fleet into the war effort. Further back in history, the use of privateers caused a very close tie between merchant and naval fleets, and also later, during the World Wars of 1914-1918 and 1939-1945 naval and merchant vessels were closely related during conflict, for instance by the confiscation of the whole merchant fleet by the State and in using them in the war efforts, for transport, evacuation and supply. Also the ruses used in naval warfare, such as Q-ships and the use of false flags, have done much to continue to blur the distinction between combatants and civilians at sea. States themselves have also used the tool of arming their merchant vessels to defend but also attack enemy warships. *The first British counter-move, made on my responsibility in 1915, was to arm British merchantmen to the greatest possible extent with guns of sufficient power to deter the U-boat from surface attack",* wrote Winston Churchill in his history of the First World War.[694] Historical practice shows that distinction at sea has, therefore, not been without any challenges, and certainly not as easy as identifying a grey hull as the enemy and all other vessels as civilian. Although everyone will have a ready picture in his or her mind of what a warship looks like, UNCLOS which gives a definition of warships, states that a warship should bear the external markings to distinguish such ships of its nationality, which is left to the flag State itself.[695] The Hague Convention 1907 no. VII on transformation of merchant ves-

[693] W.J. Fenrick, 'The merchant vessel as legitimate target in the law of naval warfare', in A.J.M. Delissen, G. Tanja (eds.), *Humanitarian law of armed conflict challenges ahead. Essays in honour of Frits Kalshoven* (Martinus Nijhoff publishers, 1991), 425-443, at 425.

[694] W.S. Churchill, *The World Crisis, 1916-1918, part II* (1927), 353. The second countermove was the use of Q-ships, ultimately followed by the convoy system.

[695] Article 29 UNCLOS reads:

> For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

sels to warships follows the same requirement in terms of external markings.[696] The external difference between merchant vessels and enemy warships can thus be as little as the marking of the war-flag. Legally, the use of force against such vessel may shift as fast as the flag is raised. History, therefore, has given rise to ideas that enemy merchant vessels could or should be attacked. H.A. Smith, in 1950, and after going over a number of hybrid examples during the Second World War even came to the conclusion that: *Unless a firm and clear line can be drawn between the warship and the merchantman it is inevitable that the latter must be exposed to the same risks as the former*.[697] There should be no other legal point of departure than the presumption that all merchant vessels -enemy or neutral- are exempted from attack, unless they can be deemed military objectives.[698] In that sense, there is no difference in the law then and now regarding the attack of merchant vessels. This general point of departure is also underlined in the basic targeting guidelines of the *San Remo Manual*.[699] Today, however, conflicts have generally not risen to the level of the Great Wars in which merchant vessels fulfilled the conditions to be attacked as military objectives, and where merchant vessels were transformed to participate as warships, or where States made them participate in the war effort.

The law of naval warfare considers certain activities by enemy or neutral merchant vessels to render the vessel a military objective or subject to attack. The SRM, in section 60[700] and 67,[701] has prelisted with regard to

[696] Art. 2 HC VII. The only external marking to distinguish a warship from a civilian vessel in Netherlands domestic law is the war flag (*oorlogswimpel*) and nothing else.
[697] H.A. Smith, *The law and custom of the sea* (Stevens & sons limited, London, 1950), 2nd ed. 83.
[698] See e.g. Dinstein (2005), 102; Klein (2010), 289. Von Heinegg (2014), 152; Von Heinegg (2010), 359.
[699] See part III SRM, specifically para's 40, 41 and 59.
[700] Section 60 SRM reads:

> 60. The following activities may render enemy merchant vessels military objectives:
> (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
> (b) acting as an auxiliary to an enemy s armed forces, e.g., carrying troops or replenishing warships;
> (c) being incorporated into or assisting the enemy s intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
> (d) sailing under convoy of enemy warships or military aircraft;
> (e) refusing an order to stop or actively resisting visit, search or capture;
> (f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely deflective systems such as chaff ; or
> (g) otherwise making an effective contribution to military action, e.g., carrying military materials.

enemy merchant vessels and neutral merchant vessel a number of activities and that may render an enemy merchant vessel as a *military objective* and a neutral military vessel *subject to attack*. Both these lists are interesting, first in the sense that the enemy merchant vessel and the neutral merchant vessel are apparently considered to be different in character with regard to when they can be considered as military objective. It begs the question whether there is any difference in terms of the use of force between 'military objective' and 'subject to attack'. The SRM-Commentary answers this question by stating that the definition of military objective does not apply in the legal relationship between a belligerent and a neutral.[702] In other words, it seems that the term military objective cannot be used when a belligerent targets a neutral vessel. In terms of ultimate result with regard to the use of force it is, however, the same: force can both be used against a military objective and a vessel that is subject to attack.

Secondly, and more important, the list in section 60 (enemy merchant vessels) is interesting because on the one hand it lists actions that under the current API targeting rules may indeed turn the vessels into military objectives.[703] One such example is "engagement in acts of war on behalf

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[701] Section 67 SRM reads:

> 67. Merchant vessels flying the flag of neutral States may not be attacked unless they:
> (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
> (b) engage in belligerent acts on behalf of the enemy;
> (c) act as auxiliaries to the enemy s armed forces;
> (d) are incorporated into or assist the enemy s intelligence system;
> (e) sail under convoy of enemy warships or military aircraft; or
> (f) otherwise make an effective contribution to the enemy s military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

[702] SRM-Commentary, paragraph 67.7. In a discussion with a Professor Heintschel von Heinegg who was intensely involved in the drafting of the San Remo Manual, he mentioned that the difference and the commentary made here was made in order for some to accept the current draft of the sections, but not to underline a legal distinction between 'subject to attack' and 'military objective'.

[703] The key-article is Article 52 API, which reads:

> 1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
> 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
> 3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

of the enemy".[704] But on the other hand, it also includes an action that arguably does not pass the threshold of military objective under the API-targeting rules. Of particular importance is the use of force during maritime interception after "refusing an order to stop or active resistance to visit, search or capture".[705] The SRM-commentary mentions that the vessel becomes a military objective by *behaviour*, which is not a standard in API.[706] Article 52 API only renders a civilian object military by nature, location, purpose or use, and not by behaviour. Section 60 SRM, therefore, has listed on the one hand the historical grown ideas that at least the enemy merchantman could be related to the enemy war efforts, which gives rise to the customary law notion that civilian merchant vessels can be targeted if they show a number of activities. On the other hand, there are the contemporary LOAC-targeting rules that aim to make a strict distinction between military targets and civilian objectives. Of note, however, in this context is that Article 49(3) API mentions that the API-provisions on targeting do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.[707] The provision suggests that customary rules of warfare at sea are not automatically set aside by Article 52 API. This has also led to early comments on these API-provisions in the sense that they did not apply to naval operations.[708] While the general rules of API on targeting apply to naval warfare (as set out in Part III of the *San Remo Manual*), API does not apply as treaty law to naval warfare. Nor does it set aside accepted customary rules on the loss of protection from attack or becoming a military objective during naval warfare. What follows from this, is the view that the customary rule of becoming subject to attack or a military objective when a merchant vessel is resisting submitting itself to belligerent visit and search, cannot be barred through the application of API. It may be arguable and depending on the circumstances whether an enemy merchant vessel without any further suspicion of contributing to the war effort, that refuses an order to stop or actively refusing to be boarded the vessel, is in fact making an ef-

[704] Paragraph 60 (a) SRM.
[705] Paragraph 60 (e) and 67 (a) SRM.
[706] SRM-Commentary, 60.6.
[707] Article 49(3) API reads:

> 3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

[708] Politakis (1997), who cites Michael Bothe's view on this on p. 639.

fective contributing to military action and the destruction of it will give definite military advantage. If that is the case, in Sections 61 and 68 SRM it is underlined that subsequent measures must be in accordance with the basis targeting rules that includes proportionality. The vessel becomes a military objective, the person on board may or may not be part of the balancing test of proportionality. To illustrate, an enemy passenger liner that sails under convoy of enemy warships may be deemed a military objective, but attacking it may be a disproportionate measure when the passenger liner has many civilians as passengers on board. Another example more closely connected to interception is that situation in which a vessel refuses to let itself be subjected to visit and search and is deemed to be subject to attack. Sinking the vessel may, however, not be a proportionate action depending on the risk that is posed to the persons on board and the question whether these persons can be seen as having lost their protection as civilians.

10.5.1.2. Use of force under the prize law rules

Next the situation where force is used against a vessel that may be considered as military objective, the other situation is the use of force against merchant vessels under the prize law rules, which apply to neutral merchant vessels. The unique thing, that has already been noted, is that the law of naval warfare accepts a limited number of circumstances in which the use of force against merchant vessels is not prohibited. As stated above, neutral merchant vessels can under circumstances be made subject to attack.

With regard to neutral merchant vessels, situations can occur in which the activities of a neutral merchant vessel do in fact conform to the definition of military objective, for instance when it is engaged in belligerent acts on behalf of the enemy.[709] There are also instances were a neutral merchant vessel does not become a military objective, but still can be subject to attack. In the context of maritime interception two situations are interesting to note, which are both listed in section 67(a) SRM. First, it is considered that carrying contraband to the enemy makes the vessel subject to at-

[709] Section 67(b) SRM.

tack.[710] Still, the decision to attack must fulfil the question if the vessel by carrying contraband actually effectively contributes to the military action and its destruction offers military advantage. It is may be easy for absolute contraband such as weapons and other military materiel, but less easy when it a cargo of flour meant for the civilian population but by the belligerent put on the contraband list. Contraband can consist of many different things ranging from actual war materiel to other material that may support the war effort in the most widest and remote sense, for instance luxury goods that alleviates the hardships of conflict on the population of the enemy State. It would not seem that there is a clear military advantage in these cases to render the vessel a military objective. Furthermore, questions can be posed whether a vessel that is suspected of carrying contraband and in which the commander of the warship decides to check its paperwork, immediately be considered a military objective because it intentionally and clearly resists the orders of the commander? Although reasonable suspicion of carrying contraband is enough to use the belligerent right of visit and search, is it also enough to consider it a military objective? Probably not, more likely is that based on the targeting-rules the vessel actually needs to be positively identified as carrying contraband. It, however, still allows for using force against the vessel according to the SRM.

Second, neutral merchant vessels are also subject to attack when they (attempt to) breach a blockade.[711] Apart from the overall notifications, the blockading power in stopping the vessel must first issue appropriate warnings when a merchant vessel is trying to breach a blockade after which he can use force to stop it.[712] The mere fact that the vessel breaches a blockade is enough to use force against it. It does not have to fulfil the conditions of a military objective. It might very well be a neutral merchant vessel that is simply taking its chances to escape or enter a blockade port without having anything to do with the conflict. The Netherlands government after the *Flotilla* incident underlined in its answers to parliament that

[710] Section 67 (a) SRM.
[711] Section 67 (a) SRM.
[712] Section 98 SRM.

under these circumstances the rule of using force to stop a blockade-runner still applies.[713]

Both enemy and neutral merchant vessels if captured must be brought before a prize court. If a vessel, however, can be targeted because it is deemed to be a lawful military objective but is captured as a lesser means, this would arguably not be the case. Somewhat outside the discussion is the issue of the use of force rules to sink a vessel *after* it has been captured. In the case of a capture of a military objective this would be possible. In other cases of capture, destruction, for instance because there is no practical opportunity to bring the captured vessel into port or another military necessity arises which necessitates destruction rather than prize court procedures, is debated. If destruction is authorized it is strictly limited to first putting the persons and the ships papers out of any danger.[714] 'If this is not feasible', opines Von Heinegg, 'destruction is illegal'.[715]

10.6. Relationship human rights law and the law of naval warfare

The preceding paragraphs have noted that during international armed conflict force can be used against vessels that are considered to be military objectives, which can for example either be vessels that are to military enemy opponent (enemy warships), but also enemy and neutral merchant vessels that have lost their protection due to hostile activities. A discussion may be raised at this point as to whether human rights law plays a role in this scenario. If one accepts that human rights law continuous to apply during armed conflict, obviously this point of view also applies to armed conflict in the maritime dimension.[716] Both the separate legal regimes of IHRL and the specialized law of naval warfare will co-exist during an international armed conflict. Imagine the following *casus*:

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[713] *Letters to Parliament*, 13 July 2010. Kamerbrief inzake beantwoording vragen van het lid Van Dam over de aanval van Israël op een internationaal hulpkonvooi. At: http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2010/07/13/kamerbrief-inzake-beantwoording-vragen-van-het-lid-van-dam-over-de-aanval-van-israel-op-een-internationaal-hulpkonvooi.html.

[714] See rule 2 of the *Submarine Protocol* 1936.

[715] Heinschel von Heinegg (2013), 522.

[716] Contrary views also exist, namely the separatist-approach. This approach contains the view that LOAC applies during armed conflict and IHRL applies during peacetime circumstances. See T.D. Gill, 'Some reflections on the relationship between international humanitarian law armed international human rights law: a plea for mutual respect and a common sense approach', in *YIHL* (2013), 335-351.

> A neutral merchant container vessel is asked to stop in order to be boarded by a belligerent warship. The commander has reasonable suspicion that the vessel is carrying contraband. After repeatedly hailing the vessel, it still does not comply with the order to stop for inspection. The commander of the belligerent warship decides to administer gradual steps of force; warningshots across the bow, non-disabling fires and ultimately disabling fire against the vessel if need be or the insertion of a boarding team to take control of the vessel.

The 'traditional' way to look at the use force according to the rules of naval warfare in this case, is that the vessel, by its refusal to cooperate, becomes a subject to attack. The fate of the persons on board is part of the proportionality considerations inherent to applying force.

If one would accept that also human rights law continuous to apply, another scenario becomes possible relating to targeting of merchant vessels. One could to argue that stopping a neutral merchant vessel is in fact something that must not be seen within the context of whether or not a vessel becomes subject to attack. The neutral merchant vessel is not a party to the conflict and the use of force to stop the vessel does, arguably, not directly weaken the enemy military forces. If one would follow this path, force is used against a civilian merchant vessel with civilians on board and with the ultimate aim to bring the vessel to a prize court. If using force in this case is considered as more of an activity that fits better into the law enforcement paradigm, which, as mentioned in Chapter 2, refers to the exercise by state agents (such as naval forces) of police powers to maintain public security, law and order, it would lead into the direction that the force applied is within the legal regime of human rights. In this perspective, visit and search is approached from the idea that the activity is *de facto* a policing action against civilians. The prevailing view, however, still is that taking measures against resistance to visit and search must be viewed within the context of an act of hostility and therefore under the rules of naval warfare.

Firstly, there exists a set of rules that especially deals with the particular situation. Secondly, the belligerent act of visiting and searching a vessel is not focused on policing, or maintaining public security and law and order at sea, but aims at depriving the enemy of continouing its war effort, for

which certain legal instruments exist. It aims, therefore and albeit indirectly, at weakening the enemy armed forces. Supporting such, will make vessel loose its protection. Let's now develop the *casus* a bit further.

> After several warning shots the vessel has stopped and the boarding team is put on board by helicopter to take control of the vessel. Once on board the target vessel, the crew and passengers appear to be hostile and act through armed resistance against the boardingteam. Some passengers appear to have nothing to do with the resistance against the boarding team and try to stay clear from any violence.

What force can be used against the persons on board? At this stage of the casus, one might again argue that both LOAC and IHRL coexist together. A first view is that by armed resistance the civilians have now lost their protection under LOAC and can be targeted because they are considered to take direct part in hostilities. A second view is that the resistance cannot be brought under the umbrella of taking direct part in hostilities, in which case the persons are still seen as civilians under LOAC protection. This still leaves room for personal self-defence to use force against the persons that may be an imminent threat to the boarding team. Coercive action to control the persons on board in order to ultimately search the vessel, should than be seen to better fit the law enforcement paradigm. In this latter view, force against the persons is regulated by human rights law. Although both views are arguable positions, when seen in the context of the preceded refusal to stop in order for the vessel to be visited and searched which made the vessel subject to attack, subsequent armed resistance by the crew might well be taken as taking up arms against a Party to a conflict aimed at directly causing harm to that Party.

What can be distilled from this small *casus* is that human rights in the context of enforcing belligerent rights against civilian merchant vessels does rise to the foreground and may coexist as a legal regime next to the law of naval warfare. Once on board and when directly dealing with individuals, there is more ground to argue that human rights law could play a role during the conduct of authorities that are based on the law of naval warfare. The *Mavi Marmara*-incident shows that opposed boardings are not theoretical and that there might indeed be a mixture of persons on board of persons taking part in hostilities and persons that are not, but un-

der the circumstances may still be threatening to the boarding team. Beyond solely the use of force, the possibility of operational (security) detention also belongs in this discussion. This, also in the context of the *Mavi Marmara*-incident, will be touched upon in Chapter 11.[717]

10.7. Use of force in UN-mandated interception operations

UN-mandated interception operations may range from peacekeeping to peace-enforcement operations in support of, or against a State. Chapter 5 has already commented on the debate on whether maritime embargo operation can be classified under either Article 41, 42 or somewhere in between.[718] It was submitted there that explicit maritime embargo operations may well be within the realm of Article 42 of the UN-Charter. In such cases, and in the cases where a resolution authorises *all necessary measures*, or words alike, it implies that military force can be used to fulfil the given mandate.[719] The phrase does not, however, clarify within which legal regime that force may be applied. The applicability of *how* force is administered in a UN-mandated maritime interception operation relates to the question whether the threshold of LOAC is met. Therefore, whether LOAC or IHRL applies to UN-mandated MIO will depend on the actual circumstances of the case.

10.7.1. UN-mandated MIO and LOAC

As mentioned above, for LOAC to apply the threshold of armed conflict must be met. The application of LOAC in UN-mandated MIO, however, does not occur often, especially not in the context of maritime embargo operations. A maritime embargo operation by itself does not trigger LOAC. There is also neither actual armed hostility against the State under sanctions, nor is there a situation in which the embargo enforcing States by enforcing the embargo have come in armed conflict with non-state ac-

[717] See Chapter 11, paragraph 11.8.
[718] See Chapter 5, paragraph 5.5.
[719] Interestingly, the first time that the all necessary measures-type wording was used, was in the context of the Iraqi maritime interception operations with UN-res. 665 (1990), which at that time caused considerable discussions on whether the phrase indicated to authorization for the use of military force. Its exact phrase, however, was not all necessary means, but to "use such measures commensurate to the specific circumstances as may be necessary". From then on, the precedent of using such wording and especially its meaning was set ever since. See *Security Council Report, 2008 no 1. Security Council actions under chapter VII; Myths and realities.*

tors. Measures taken are against maritime traffic not particularly of the targeted State. Practice also indicates that the law of naval warfare authorities were not used in any one of the specific UN-mandated *embargo* operations that aimed to enforce sanctions. Moreover, the application of the law of naval warfare is limited to international armed conflicts, which will further limit the scope of application of that part of LOAC in embargo operations.

International armed conflicts that existed while enforcing a UN-mandate and had also a MIO component were Korea (1950-1953), Iraq (1990) and Libya (2011). Belligerent rights during the MIO were only used in the first two, and not in the latter case of Libya. In the latter case, as McLaughlin notes (although referring to Iraq-operations of 2003, rather than 1990), "There was no LOAC based notice to mariners or special warning of a nature similar to that promulgated in relations to that of Iraq in 2003".[720] The difference between Libya and the large scale operations of Iraq and Korea were that the latter were not specifically implementing economic sanctions, but used the law of naval warfare to fulfil the mandate in a factual situation that amounted to an international armed conflict. The Libya case is unique in the sense that UNSC explicitly authorized a maritime embargo, which was conducted amidst an overall international armed conflict between the NATO-led States and Libya. What NATO, however, did not do was change the existing embargo authorities to authorities based on the law of naval warfare.

The Libya situation points in the direction that whereas embargo operations may not amount to an situation of armed conflict by itself, the law of naval warfare could more quickly apply when the maritime embargo operations are looked at from a broader campaign perspective in which the maritime embargo is an integrated part of the wider military campaign that based on the factual circumstances of the case could be considered as an international armed conflict against a targeted State, and in which warships participating in the embargo also have a war-fighting task in the wider campaign. A similar argument, although not in the context of enforcing an UN-embargo, was used by The Netherlands to apply the law of naval warfare to warships participating in OEF, which on land was con-

[720] McLaughlin (2015), 268.

sidered for a period an international armed conflict. The Netherlands did not divide between the land and maritime dimension, even though at sea there was no ongoing factual situation of armed conflict. Going back to the Libya-case, from the campaign perspective, it could have been argued that also the embargo was integral part of the international armed conflict, a situation derived from the air campaign. Arguably, however, the mandate itself in connection with the phrase *all necessary means* may play a role as a limiting factor as to whether it is actually needed to base the authorities of the embargo on the law of naval warfare. As these authorities are not obligations, they may apply, but at the same time may not sit very comfortably with the overall purpose of the mandate and the political background of why an embargo -as opposed to a belligerent blockade- against specific items was established by the Council in the first place. Therefore, the UN-mandate itself may have a limiting effect on the actual use of the law of naval warfare. As McLaughlin concludes; 'In most cases, the UNSC's clear preference is to employ MEZ[721] of varying scope via the mechanism of non-LOAC based sanctions-enforcement regimes.[722]

This practice shows that an embargo that is conducted in the context of an armed conflict could be governed by LOAC, if the States that are conducting the embargo were parties to the armed conflict. This was clearly the case in Korea. In the cases of Iraq (1990-1991) and Libya (2011) this is less straightforward. Some States were and others were not. France, for instance, was engaged in hostilities in both conflicts, whereas the Netherlands was not in either situation. Therefore, the operations involving the use of force by naval forces of the Netherlands conducting the embargo were not governed by LOAC, but by human rights law standards.

10.7.2. UN-mandated MIO and human rights

Today, there is no doubt that human rights continue to apply in military operations that are based on Chapter VII of the UN-Charter. In the *Al Jedda*-case the European Court of Human Rights opined that human rights law doesn't apply only in situations where the UNSC has explicitly stated

[721] Maritime Exclusion Zone.
[722] McLaughlin (2015), 269.

that it does not. [723] In practice, none of the UN-resolutions that have formed the basis for MIO have explicitly mentioned that IHRL does not apply. On the contrary, human rights are mentioned specially in certain resolutions that are connected to MIO in particular. The UN-resolutions with regard to piracy have consistently underlined that the fight against piracy must be in accordance with human rights.[724] SC-Res 2020 (2011) noted in several paragraphs that actions against possible pirates taken must be in accordance with relevant human rights law. The Netherlands district courts before which several piracy cases where brought, never doubted that human rights applies in cases of pirates captured within the context of the counter-piracy operations off the coast of Somalia and in the context of the UN-resolutions. As such, with regard to counter-piracy operations off the coast of Somalia no tension arises between Article 103 UN-Charter and the applicability of IHRL.[725] Another example is SC-Res. 2146 (2014) with regard to the Libya. In this resolution the UNSC explicitly stated that authority to board and inspect and to use all measures commensurate to the specific circumstances must be in compliance with international humanitarian law and human rights law, as may be applicable.[726]

Secondly, in terms of attribution, in principle human rights violations can be attributed to States even if the State conducts the operation under Chapter VII of the UN-Charter. This would not be the case where a maritime interception operation is UN-controlled and actions can be attributed to the UN rather than to the participating State. The only MIO that falls under this situation is MTF UNIFIL. Taking the view that maritime embargo operations do usually not amount to an armed conflict, force used is regulated by human rights law. Force against the vessel, for instance to

[723] *Al Jedda*, paragraph 102. The Court stated in this paragraph that :

> Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

[724] E.g. 1816, para 11; 1846, para 14; 1851, paragraph 6.

[725] See also Guilfoyle, 'Counter-piracy law enforcement and human rights', *ICLQ*, vol. 59 (2010), 141-169, at 152.

[726] SC-Res. 2146 (2014), para 5.

stop it, must be in line with the *Saiga*-criteria, where after appropriate warnings, reasonable and necessary force as a last resort[727] and where the lives of the persons are not endangered is possible. Once on the suspect vessel, force used against the persons on board is regulated by human rights law standards.

10.8. Use of force in self-defence interception operations

The use of force in self-defence naval operations in the traditional sense will usually trigger the conditions of an international armed conflict to which LOAC applies. In terms of the use of force against the opponent, in general, there is no difference between an IAC and a NIAC. In terms of the application of the law of naval warfare, however, there is a difference as this part of LOAC is considered not to be applicable in a NIAC. The non-applicability of the law of naval warfare in this situation has consequences. As noted above, the rules on prize give the authority to use force against merchant vessels. In a NIAC-situation these authorities cannot be applied. This results in a unfavourable situation that in a self-defence operation that has the character of a NIAC there are no legal instruments that can be used against non-state actors on board a foreign flagged vessel. Neither a belligerent right of visit and search exist, nor does another basis in international law give any authorities to use force against the vessel. As mentioned in Chapter 9, one possibiliby would however be to apply self-defence in the manner to provide a legal basis when it is 'harboring' non-state actors and the flag State is unable and or unwilling to act, or when the vessel is completely under the control of the non-state actor and has become a military objective. Although the individuals themselves on board may be directly targeted, from a practical perspective the boarding of the vessel will most probably be one of the prerequisites to get enough close to the individual. Instead of boarding the vessel, directly targeting persons through other, for instance more technical means such as armed UAV's, is possible but would still run against but would still runs against the issue of flag state jurisdiction.

[727] The ROE-practice is that the more force is applied, the higher the authority must be to apply force. Captain Lyons for instance mentions on the 1990 Iraq mission that in close consultation with the Ministry of Defence, the ROE permitted firing shells across the bow of the ship. Lyons, 163.

As Chapter 7 has outlined, self-defence is also viewed to be a direct legal ground in cases where the cargo of a vessel is so imminently threatening that it triggers the right of self-defence. In cases where the armed conflict threshold is not passed, it seems obvious that the use of force is regulated by human rights law. Chapter 9 has, however, also noted the existence of a view that is called the "third rail" by Geoffrey Corn,[728] in which the law of self-defence provides both a basis *and* a legal regime for and during military operations. The law of self-defence is not only used to determine whether force *can* be used, but also provides the legal regime in which force *is* used, based on the conditions for the application of military force under the law of self-defence (proportionality, necessity, immediacy). The third rail is argued in cases where the legal basis is self-defence, but where the situation may not be considered as an armed conflict. As Corn has correctly noted, this approach firstly completely blurs the distinction between the *ius ad bellum* and the *ius in bello* -self-defence is not meant to provide also a legal regime on the use of force- but also blurs the divide between the use of force in LOAC and human rights law.

10.9. Concluding remarks

In order to successfully conduct maritime interception operations it may be necessary that force is used. The legal regimes that regulate the use of force are human rights law and the law of armed conflict. Although the use of force in the maritime dimension has traditionally been approached through the international law of the sea, it has been submitted here that, basically, this meant applying law enforcement standards to the maritime dimension. The focus on persons and the evolution on extraterritorial applicability of human rights law allow accepting more readily that the use of force against vessels and persons at sea can be considered through human rights law standards.

Where maritime interception operations are conducted in the context of an international armed conflict, the law of armed conflict, and in particular the law of naval warfare, applies. The latter regime does not, however, apply in non-international armed conflicts. As human rights law standards can also apply to MIO during armed conflict in terms of the use of force

[728] Corn (2012).

human rights law and LOAC can co-exist. The question which framework would prevail in such circumstances primarily arises in situations where the boarding party is on board the target vessel.

CHAPTER 11

Detention at sea

The practitioner should be cautioned that authority to intercept a vessel does not always equate to authority to detain the vessel, its contents, or its crew.

-Winston G. McMillan, Major United States Marine Corps[729]

11. Introduction

In the land dimension of military operations, the legal aspects of detention are a much discussed topic. In particular in the context of the legal grounds for detention during non-international armed conflict. Traditionally, naval operations have been primarily cargo and vessel-focused, rather than person-focused.[730] Generally, UN-mandated maritime embargo operations concern themselves primarily with prohibited items, which are dealt with by either seizing the goods or diverting the vessels. During international armed conflict, and apart from taking prisoners of war, the law of naval warfare is primarily concerned with contraband goods or the capture of vessels that breach blockades. Belligerents and prize courts have generally no legal interest in persons. Detention at sea has, therefore, been rather an exceptional activity. Today's maritime security operations have, however, have put a renewed focus on the fact that the military at sea may encounter persons that may, for some reason, need to be detained. For ex-

[729] W.G. McMillan, 'Something more than a three hour tour: rules for detention and treatment of persons at sea on U.S. naval warships', in *The Army Lawyer*, no. 31 (February 2011), 31-45.
[730] This is, however, not to say that at sea in general there has never been any attention to human beings. Obviously, within the context of maritime law enforcement, such as drug- or human trafficking, there is clear attention to human beings at sea. But within the context of conducting naval operations, persons at sea played a secondary role of importance to vessels and cargo.

ample, because the person is a criminal suspect or is part of an organized armed group. Counter-piracy operations have done much to surface challenges that come with detention at sea. During the Libya operation in 2011, the UNSC authorized measures to stop mercenaries, next to arms related materiel. Operation *Enduring Freedom* has searched for terrorists and, interestingly, within the context of armed conflict, the Israeli blockade operations have brought the fate of persons on board the target vessels under attention. A general outcry by States was heard to release the persons on board the *Mavi Marmara,* rapidly followed by a request of the UNSC to release the detained persons that had breached the blockade. These examples and the awareness that persons may be the subject of maritime interception operations have even prompted a change to the definition of MIO as mentioned in Chapter 1 to include persons next to objects.[731] In other words, situations may exist during maritime interception operations in which persons at sea may be deprived of their liberty. This chapter reflects on the issue of detention in the context of maritime interception operations. It will briefly introduce the notion of operational detention and will then discuss the particularities of detention in the maritime environment. It must, however, be said upfront that apart from certain specialized provisions on detention at sea, such as the provisions of the handling of prisoners of war at sea, there is no difference on the applicable law on detention applied to the maritime dimension.

11.1. Operational detention

The term *operational detention* is now often used to describe detention in military operations. Kleffner has defined operational detention as: 'the deprivation of physical liberty of a person in the context of a military operation, whether for reasons of security or law enforcement purposes.'[732] He states that this definition for the deprivation of physical liberty is intentionally broad, 'to capture military operations in their entire variety'. Within the term operational detention, a threefold distinction is made in persons that can be detained, either for reasons of security (security detainees or administrative detainees), persons that are suspected of criminal

[731] See Chapter 1, paragraph 1.3.
[732] J. K. Kleffner, 'Operational detention and treatment of detainees', in T.D. Gill and D. Fleck (ed.) *The Handbook of International Law of Military Operations* (2010), 465-480.

offenses (criminal detainees) and persons that can be detained because they fall within the category of prisoners of war (PW). Certain features separate security detainees from criminal detainees which is important to give some attention to at this stage. First, security detainees are detained for reasons of a possible *future* threat (although that can be based on possible past conduct), while criminal detainees are detained because of a suspected (criminal) action that has already taken place. A second difference concerns the authority to detain. Security detention is ordered by the executive branch -that is by the military themselves- while criminal detention is ordered by the judicial branch. A third difference is that security detention is usually aimed at enhancing the security of the military force, or the persons that are entitled to protection. Criminal detention takes place because a certain act may be punishable under criminal law. Detention in this case is, therefore, not because the person threatens the military itself. Security detention can, therefore, also be considered as defensive measures, whereas criminal detention is more of an active engagement towards suspected criminals.

Next to the three different categories of detainees, one can also distinguish between legal grounds[733] for detention and safeguard & treatment for detention. The first relates to the legal ground upon which a person can be detained. The general challenge with legal grounds for detention is that not under all circumstances a specific legal ground exist, but is argued through interpretation of other provisions. Be that as it may, it is underlined here that at all times as a fundamental requirement for detention a legal ground must exist, implied or explicit, for the detention of persons. The second, safeguards & treatment for detention, relates to the wellbeing of the detained individual. This is subdivided in a substantive (treatment) and procedural part (safeguards). For example; treatment relates to how detained persons must be physically treated. Safeguards relate to the individuals rights during detention in terms of legal process, such as to be brought promptly before a judge.

[733] I am using the term legal *ground* as oppose to legal basis, to distinguish between the legal bases in general for maritime interception operations and the legal basis for detention in particular. The legal basis of a detention may for instance be a treaty and the legal grounds for detention are the provisions in the treaty that deal with detention.

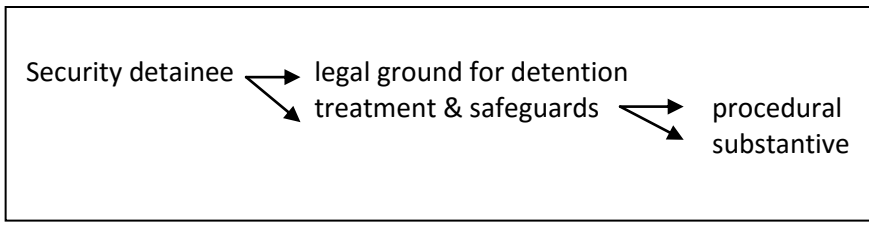

Fig. 11.1. How operational detention can be subdivided; example of a security detainee.

11.2. What constitutes detention during maritime interception operations

Operational detention can also take place during maritime interception operations. In the broadest sense, detention is the deprivation of liberty. On the one hand, this goes beyond the classic detention situation after an arrest. On the other, a detention must also be sufficiently serious not to be merely a temporary restriction of movement. The obvious examples are persons that are being detained on board because they are suspected of having committed a crime, or are captured as enemy combatants. There are also situations, however, in which the answer to the question whether a person is in fact detained, is not so entirely obvious. Three examples to illustrate such situations:

Example 1: small boat search
The boarding team comes on board a small vessel for a search of cargo. They ask the persons on board to stay on one side of the vessel until the vessel is searched and the boarding team has left the vessel. If the crew is not cooperating they can also be forced to do what is ordered. The boardingteam is carrying arms and the supporting warship has an armed overwatch on the small vessel. When the vessel is cleared and the boarding team has left, the crew is free to move over the vessel again.

Example 2 : transit of a captured blockade runner
A vessel is captured because it has tried to breach a blockade. The vessel is being escorted into a port. During the transit to port the vessel is under

military control by an escorting warship and a security team is on board the vessel itself. The captured vessel is still navigated by the original crew. The captain and crew of the vessel will have to stay on board until the vessel is anchored in port. In port, a further decision awaits to keep the captain and relevant crew available during the prize court procedures, or whether they are free to leave.

Example 3: diversion of a suspected vessel to inspection port
A large container-vessel is searched during an UN-mandated maritime embargo operation. During the search, the crew not essentially needed for navigating the vessel or assisting the search is asked to gather and stay in one room which is under control of a security team from the warship that is conducting the boarding. During the inspection the boarding team has gained suspicion that there may be forbidden items on board. The MIO-commander has decided to divert the vessel to a port for a further and more thorough inspection. Under convoy of a warship the vessel is ordered to navigate into port X for further inspection.

These three examples give rise to the question of when one can actually speak of detention of person on board a vessel that is under different levels of control by the visiting warship. Doswald-Beck offers that detention exists when persons are restricted to a place and cannot leave when he or she wishes to leave.[734] The European Court's guide on Article 5 ECHR mentions that: 'Relevant objective factors to be considered include the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts'.[735] In the small boat example, there may be good reasons to argue that these persons are deprived of their liberty because during the search of the vessel they are not allowed to move and can also be forced to stay at their appointed place, under threat of force. These persons are under control of the boarding party. It is, however, different when the boarding party is on board the small boat as a so called 'friendly approach'-activity, and no one is restrained in their movements. In the blockade-runner example, the capture is focused on the vessel and not intended to detain the persons. As will be discussed in later sections of

[734] Doswald-Beck (2011), 254.
[735] *ECtHR Guide on Article 5 of the Convention Right to liberty and security* (2014), paragraph 8.

this Chapter, the crew are not prisoners of war. The persons on board are not physically detained and are free to move on the ship in order to operate it, but they are still forced to sail it into port, while under military control. In the third example, the crew is also not physically detained and there is also no military control on board the vessel. Still, the vessel is asked to follow orders to be diverted to an inspection port. Their limitation in liberty is that they cannot sail the vessel elsewhere than ordered by warships that are enforcing a UN-mandate.

The situation of persons on board a captured *vessel* is in fact merely a practical or logistical one, in which the persons are not deprived of their liberty, but where there is simply no other possibility to let them leave until a port is reached. Persons on board are not held for reasons of security or because of criminal detention, but because they practically cannot leave the vessel and are usually needed to sail the vessel into a port.[736] Could, theoretically, the crew and passengers be transferred at an earlier stage to another vessel, they will be entirely at liberty when the possibility occurs. Moreover, it has never been argued that persons who were limited in their liberty through the execution of rules of the law of naval warfare because their vessel was captured or diverted were automatically detained. The vessel and goods will be brought before a prize court, but no juridical procedures are instigated against the persons on board that vessel. Persons on board a captured vessel can be released as soon as they reach the port. When it is expected that the persons will have to testify in court proceedings, it is more likely that they will be summened by court order and may for the purpose of ensuring they will testify, be detained. But all this will happen under lawful court orders. In sum, the law of naval warfare takes the view that when capturing vessels, the persons are not also automatically detained. It is thus submitted here that the capture or visit of a vessel does not mean that persons on board are thereby automatically detained. The same can apply to a diversion to a port based on the need for further inspection of a vessel for sanctioned goods during a UN-mandated maritime embargo operation: no detention of the persons on board takws place in principle, unless the actual situation on board considered through objective factors lead must lead to the conclusion that persons are in fact de-

[736] The alternative is to bring in a so called prize crew, which is a military crew that will take over the vessel.

tained. For instance, when during the transfer of the vessel persons are physically held on board, confined to a quarter under surveillance of an armed guard for reasons of security of the boarding crew.

11.3. Prisoners of war at sea and crews of enemy and neutral merchant vessels

The first category of operational detainees is prisoners of war (PW). This category exists when there is an existence of an international armed conflict. Article 4 GC III and Articles 43 and 44 API define who can be considered as prisoners of war. The interesting point to note with regard to PW's at sea is that in Article 4 GC III, next to the regular combatants and all who fall within the scope of combatants, in subparagraph 5 also includes members of crews, including masters, pilots and apprentices, of the merchant marine of the parties to the conflict. This Article, therefore, opens the possibility that civilians on board enemy merchant vessels (as opposed to neutral merchant vessels) may be considered as prisoners of war. This provision must be read in conjunction with Articles 5 to 8 of HC XI *Relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War*,[737] which deal with the status of persons on board an enemy merchant vessel. This group of provisions has basically three principles. First is that enemy merchant vessels are liable to capture. Second is that persons on board enemy merchant vessels are not to be made prisoners of war, *if* they formally promise not to take service on an enemy merchant vessel or take part in operations of war.[738] And the third principle is that when the ship takes otherwise engages in acts rendering the vessel a military objective, the second principle does not apply.[739] Consequently, they will be made prisoner of war.[740] Unlike crews of enemy merchant vessels, Article 4 GC III does not contain grounds to detain a crew of a neutral merchant vessel under PW-status. The *US Commander's Handbook on the law of naval operations* notes in this regard that:

[737] *Hague Convention XI relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War*, The Hague 18 October 1907 (HC XI).
[738] Articles 5 to 7 HC XI.
[739] Art. 8 HC XI.
[740] Tucker opined that the practice in the Second World War has led to the obsoleteness of releasing enemy merchant crews by written promise of not returning to operations of war (Tucker, 111-112). The practice during the Second World War, however, must be seen in the context that merchant vessels and crews were effectively integrated in the warfighting capacity of the belligerents and structurally constituted military objectives.

"The officers and crews of captured neutral vessels who are nationals of a neutral nation do not become prisoners of war and must be repatriated as soon as circumstances permit".[741] The logic behind capturing the vessel but not the crew would be that the crew is in principle only the driver of the ship and is not automatically connected to the possible contraband they are carrying. Although it is not unthinkable that it might be otherwise, captains and crews of for example huge container-vessels that solely serve as transporters of containers will in principle not be connected to the cargo they are carrying.

11.3.1. Passengers

Passengers are a separate category of persons that can be on board a vessel. One must presume that a passenger is a civilian, until proven otherwise. The fact that a vessel is considered an enemy vessel does not also presuppose that the passengers on board should be considered as enemy, which can be detained under PW-status. The distinction is important because firstly, Article 8 HC XI refers to *ships* taking part in hostilities, not persons. Secondly, the point of view that passengers are not crew also matters in the proportionality considerations if a warship comes in the position that it has to use force against a merchant vessel. Passengers who are not part of the crew must be dealt with on their own individual merits. In line with this approach Von Heinegg mentions that: 'Passengers who are nationals of a neutral State will be released unless they have directly taken part in hostilities.'[742] As a point of departure, passengers cannot be detained, but their activity on board will determine whether there are grounds to detain them. A passenger can either be a security threat or directly take part in hostilities.[743] In the latter case, passengers will lose their

[741] See paragraph 7.10.2 *US Commander's Handbook*.
[742] W. Heintschel von Heinegg, 'Maritime warfare', in A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014), 145-181, 171.
[743] Historical cases exist in which passengers on board neutral vessels were deemed to be combatants by the visiting belligerent forces, such as the *Asama Maru* case in 1940. In 1940 *HMS Liverpool* received the order to board a Japanese flagged merchant vessel *Asama Maru*. The vessel was suspected of having German passengers on board the vessel, which they had. The Germans were taken as prisoners of war on the basis that these Germans were, although not in the military service, military aged men that could ultimately take service against England. Japan protested against this action. Later, it appeared that several of the captured men were 'relatively unsuitable for military service'. C.G. Dunham, *The Asama Maru Incident of January 21, 1940* (paper prepared for presentation at the Thirteenth Annual Ohio Valley History Conference, 1997); *The Canberra Times*, 8 February 1940, p. 4: 'Settlement of Asama Maru controversy. Anglo-Japanese understanding. Britain offers release of nine men'.

protection as a civilian. The following paragraphs will discuss the situation where a person becomes a security threat.

11.4. Security detainees at sea

Security detainees are persons that are detained for reasons of security. A core characteristic is that security detainees are civilians. This category is not limited to situations of armed conflict alone, but occurs also in situations outside such circumstances. The necessity to detain persons for reasons of security may exist within the whole range of military operations, from low to full scale naval operations, from international to non-international armed conflicts to outside armed conflict. Consequently, this means that both IHRL and LOAC might be applicable to security detention.

11.4.1. Security detention under LOAC

Security detention under LOAC during an international armed conflict is based on Article 42[744] and 78[745] of GCIV, in which there are possibilities to detain civilians for imperative reasons of security. What imperative reasons of security means, is not further defined,[746] but it does signal that security detention must be seen as an exceptional authority. Because GCIV applies in occupied territory, it poses a problem for the applicability of these articles on a vessel on the high seas. There are no equivalent provisions of Articles 42 and 78 GCIV for a maritime situation on board a ves-

[744] Article 42 GC IV reads:

> The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.
> If any person, acting through the representatives of the Protecting Power, voluntarily demands internment and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

[745] Article 78 GC IV reads:

> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.
> Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

[746] See a discussion on what security could mean in Pouw (2013), 391-393.

sel on the high seas. If a vessel is captured on the high seas there will not be a situation of an occupied territory. One could argue that a captured enemy vessel under the control of a belligerent State can be *de facto* occupied 'territory'. This does, however, not sit well with the point of view that a vessel is legally not a territory. Taking the legal fiction of the occupied territory-argument just a bit further, one could also argue that the belligerent State that is an occupying power elsewhere on land can extend their occupying powers to vessels from the occupied State. This fictional occupied territory-theory only applies, however, to enemy merchant vessels and not to neutral merchant vessels.

Another argument could be that an implied authority for belligerent naval forces may exist in order to be able to ascertain rights under the law of naval warfare. There may be many different reasons why persons want to breach a blockade, ranging from economic reasons of not wanting to be stuck at a blockaded port, to acts that deliberately are challenging the blockading State. The *Flotilla*-incident is a good example of the latter. Although it may be argued that some persons can be detained on the basis of the fact that they have taken direct part in hostilities or acted in a criminal manner against the boarding team, there may be a need for others that did not take up arms against the boarding to be detained for reasons of security, so that the capturing power can get the vessel safely to port. This argument may be the maritime translation of the view that was submitted by the ICRC: "It flows from the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat".[747] Although this view was expressed in the context of implied powers to detain in the context of a NIAC, its core underlines a view that implied authority can exist in LOAC to detain persons. The view is also found in the Turkel report, which states in paragraph 231: 'Inherent in the authority to use force under international humanitarian law is the power to detain someone who poses a threat to the safety of military personnel or who is interfering with the conduct of a mission'. This argument, although fiercely debated,[748] is, as said, used also to find a

[747] E. Debuf,'Expert meeting on procedural safeguards for security detention in non-international armed conflict', *International Review of the Red Cross*, vol.91, no. 876 (December 2009), 859-881, at 863.

[748] See e.g. S. Aughey, A. Sari, Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence, in *ILS*, vol. 91 (2015), 60-118, and result-

legal basis for detention in extraterritorial non-international armed conflict. The issue has surfaced because in the 'traditional' NIAC's fought on one's own territory detention can be based on domestic laws, but in an extraterritorial NIAC domestic laws cannot support the original set-up of the NIAC-framework. Although no explicit grounds for detention exists, proponents argue it implicitly, for instance through Common Article 3 of the Geneva Conventions, as a result of the principle of military necessity, or as a 'lesser means authority' derived from the authority to kill. The idea is that if one can lawfully kill the opponent, the lesser means -to detain- is also lawful.[749] This view does, however, exclude security detention of persons that cannot be killed in first instance, which still leaves a gap of authority to detain. Yet others remain reluctant to accept such a right, either to dismiss such right or stay in the middle by stating that it is not explicitly regulated. From a maritime perspective, security detention based on the domestic laws can only exist when the detention is within the sovereign waters of a coastal State, or when the vessel flies the same flag as the boarding belligerent warship, or when the persons are on board the belligerent warship.

11.4.2. Security detention under human rights law

Article 5 paragraph 1, a to f ECHR state the legal exceptions to the liberty of persons. It is generally accepted that none of the exceptions expressly allow for security detention.[750] The commonly used argument in which way this challenge is circumvented, is that a State derogates from its obligations, in the case of the European Convention, under Article 5 ECHR.[751] Derogation would suspend the obligations of the detaining power. For derogation to be possible Article 15(1) ECHR states that:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation,

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ing debate on *EJIL TALK!* At: http://www.ejiltalk.org/ihl-does-authorize-detention-in-niac-a-rejoinder-to-rogier-bartels/; G. Rona, Is there a way out of the non-International armed conflict detention dilemma?', in *ILS*, vol. 91 (2015), 32-59.

[749] Aughey & Sari (2015), 103-104.

[750] E.g. Doswald-Beck (2014), 263; Pouw (2013), 370-371.

[751] Doswald-beck, 263; Debuf, 867.

> provided that such measures are not inconsistent with its other obligations under international law.

Firstly, there needs to be a time of war or other public emergency threatening the life of the nation. And secondly, a State can do so to the extent strictly required by the exigencies of the situation. Obviously, the Article was not set-up to fit situations on board foreign flagged vessels. Although, arguably, the capture of the vessel may be regarded as being during a time of war when it is captured during an international armed conflict, but whether the argument can be made that the situation at sea is such that it is required by the exigencies of the situation to derogate is yet another hurdle to take. Be that as it may, what it requires of a State, also in situations of extraterritorial application of human rights, is to derogate from Article 5 ECHR.

In sum, both LOAC and human right law do not give an explicit right for security detention in the situation of security detention on board a captured foreign flagged vessel. A solution to circumvent human rights law obligations is to derogate from it, which is an exception with stringent conditions attached to it. Possible implied grounds for security detention might be argued through customary LOAC, only if one accepts that detention of persons during an armed conflict is inherent to conflict and is done to ascertain one's right under the law of armed conflict. Another argument, albeit restricted to enemy merchant vessels, would be to apply the fiction of occupied territory to enemy merchant vessels. Faced by operational necessity in modern military operations, there is a strong feeling to accept that persons can be detained for security reasons. Athough seen against the background of the environment in which naval forces operate, the need for security detention, however, is arguably less than in land-operations, situations may still exist where security detention is also needed during the interception of a foreign flagged vessel. In this sense, it is submitted here that in absence of an explicit ground, the implied grounds of detention to be inherent to conflict and the occupied territory fiction could serve as legal basis.

11.5. Criminal detention

The third and last category of detainees is the persons that are detained based on the fact that they are suspected of criminal offenses (criminal detainees). LOAC provides the possibility for an occupying Power to conduct criminal detentions. Article 43 of the annex to HC IV[752] (Hague Regulations) provides a legal authorization for an occupying Power to restore and ensure public order, which includes arresting persons for criminal acts.[753] Article 43 of the Hague Regulations reads:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Whereas Article 43 allows an occupying power to administer an arrest, the legal ground, however, to arrest is based on the laws in force on the occupied territory, which may be altered if strictly necessary by regulations of the occupying State. Here, again, the challenge is that the Hague Convention IV and its regulations do not apply on the high seas. No equivalent of Article 43 exists in the law of naval warfare. There is no legal ground, therefore, for criminal detention in LOAC at sea if no form of jurisdiction by the belligerent can be established on board a vessel. As a stretch, the occupying Power can amend the legislation in occupied territory to have its effect on the vessels of that State to allow enforcement jurisdiction to restore and ensure public order on board vessels of the occupying State. Usually also domestic criminal law will apply on the vessels of that State outside the sovereign waters of that State. This still leaves neutral merchant vessels outside the scope of the possibility. Additionally, however, but which is outside the realm of LOAC, if the criminal act is conducted against a service member of the boarding team, such jurisdiction may for instance be derived from the passive nationality principle. But, to name an example, over a fatal fight between two crew members on the vessel, the boarding party of the belligerent warship would not have the authority to detain them on the basis of criminal detention.

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[752] *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, 18 October 1907.
[753] Pouw (2013), 395.

Whereas it can be submitted here that there is no direct LOAC-based legal ground for criminal detention on the high seas, outside the situation of armed conflict criminal detention can be based on domestic criminal law and international agreements. Exemplary in the latter category are persons detained for piracy, drugs or terrorist offences. The legal basis for such detention is international agreements and customary international law. The SUA-Convention does not allow a State to arrest persons suspected of SUA crimes. Instead, it poses an obligation for State parties to make punishable in national law those crimes that are listed in SUA. This would mean that enforcement jurisdiction exists, but it is still with the flag State to arrest and punish such persons, unless it agrees otherwise with the boarding State. Obviously, with the recent counter-piracy operations criminal detention of pirate suspects has been under attention. The starting point for the legal ground for arresting pirates on board foreign flagged vessels is found in Article 105 UNCLOS. It reads:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

This Article allows every State to arrest of suspect pirates on board foreign flagged vessels. The challenge of Article 105 is that it establishes (or codifies the customary law of) universal jurisdiction over the crime of piracy, which allows States to impose the boarding State's jurisdiction onto the vessel and its individuals. But in order for universal jurisdiction to be effective, it still needs domestic laws for States to be able to legally prosecute suspect pirates, e.g. making the crime punishable under domestic laws (UNCLOS does provide that piracy is an internationally punishable act) and allowing warship commanders to legally act against pirates. A further legal basis therefore must be sought within domestic legal frameworks that will legally authorize a State to make use of the legal opportunity that is given by Article 105 UNCLOS. Quite logically, as Article 105 leaves the actual execution phase of apprehending pirates to States themselves, UNCLOS also does not contain any provisions on the treat-

ment of pirate-suspects. This is within the realm of domestic criminal law and will be subject to international human rights law. The UNSG-report on piracy (2013) reiterates that:

> 43. National authorities and courts should comply with international human rights obligations in all phases of counter-piracy operations, including apprehension, detention, prosecution, trial and transfer of suspected pirates and imprisonment of convicted pirates.[754]

11.6. Safeguards and treatment at sea

Having touched upon the legal grounds for the three forms of detention at sea, a short remark will be made on safeguards and treatment. Safeguards and treatment of detainees at sea are in either regime as a matter of applicable rules no different than they are on land. Two points, however, can still be made.

First is to note the special regulations in GC III in case persons are detained at sea. Article 22 GCIII indicates that prisoners of war taken at sea should be put on land as soon as possible. The idea behind this article, besides the fact that prisoners should not be exposed to hostilities, comes from the circumstances in which prisoners during World War II aboard Japanese vessels suffered severely.[755] Today, however, with modern warships with fairly good conditions, this idea does not per se need to apply to modern warships. Rather, it is sometimes argued that placing prisoners temporarily on board a warship might be a better place for the care and protection of prisoner of war than on land.[756] The essence regarding prisoners of war seems rather to have moved to Article 19 GCIII, indicating that prisoner of war within the shortest possible time after their capture, are transported to camps, far enough out of the combat zone to be out of danger.[757] Nevertheless, the rule remains that prisoner of war should be

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[754] S/2013/21, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, October 2013. At paragraph 43.

[755] The so called 'hell ships'.

[756] This thought is also articulated by the ICRC, including in Frederic the Mulinen's *Handbook on the law of war for armed forces*, which states that: Prisoner of war camps shall be located on land except where clause there are better temporary conditions elsewhere (e.g. an advanced camp on heated ship rather than open tents on land unusually cold climate). F. de Mulinen, *Handbook on the law of war for armed forces (1987)*, 151 (no. 674).

[757] Article 19 GC III reads:

> Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situate

held on land, unless circumstances necessitate a different decision. Practice also exists. Both in the Falklands as the Iraq War of 2003, prisoners of war were temporarily held on board ships instead of on land.[758] During Operation *Iraqi Freedom* prisoners of war made by the United States were brought aboard US warships in the Persian Gulf. The American warship *USS Dubuque* served as a PW camp until the PW-camps were ready to be used on land.[759]

Second is the issue of promptness within the context of human rights law and detention. With regard to safeguards and treatment within the context of human rights law, there are no specific differences between the application on land or at sea. In terms of treatment, Pouw mentions a number of subjects to be dealt with within the context of human rights law when a person is detained, such as physical and mental integrity, dignity and respect, food and drinking water, hygiene and clothing, medical care, religion, personal belongings, public curiosity, and torture, cruel or degrading treatment or punishment.[760] With regard to safeguards Pouw mentions that detainees must not be held secretly, must be granted access to communicate with the outside world, must be notified on the reason for detention, must be compensated for unlawful detention, and additionally for criminal detainees, must be brought promptly before a judge.[761] Although these conditions for treatment and safeguards apply equally at sea, what does differ, however, is that the specific maritime dimension has its effects on the way how safeguards are filled in practice. In this context, it is in particular worth mentioning the safeguard of promptness in connection to maritime interception. With regard to promptness, Article 5(3) ECHR states that:

> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a

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ed in an area far enough from the combat zone for them to be out of danger.
Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone. Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

[758] G.P. Noone, 'Prisoners of War in the 21st Century: Issues in Modern Warfare', in *Naval Law review* vol. 1, no. 50 (2004); Mordarai (2013), 817-838.

[759] See: http://www.history.navy.mil/content/dam/nhhc/research/archives/command-operation-reports/ship-command-operation-reports/d/dubuque-lpd-8/pdfs/2003.pdf.

[760] Pouw (2013), 381.

[761] Pouw (2013), 373-377.

> reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

The ECtHR has judged several times on the issue of promptness at sea (*Rigopoulos, Medvedyev)*,[762] twice particularly with regard to piracy, in *Hassan and Ali Samatar*. With regard to the requirement that detained persons should be brought promptly before a judge the practical fact is that it can take time to bring a person before a judge when a person is detained somewhere on the high seas, where it could take days to sail into a port, to fly in an investigating judge, or where the technological means are sufficient enough to allow for a meeting in a digital manner. In different court cases the ECtHR has developed a "wholly exceptional circumstances"-view. In the *Rigopoulos*-case the Court stated that:

> The Court nevertheless considers that a period of sixteen days does not at first sight appear to be compatible with the concept of "brought promptly" laid down in Article 5 § 3 of the Convention. Accordingly, only wholly exceptional circumstances could justify such a period. It must therefore examine whether there were such exceptional circumstances in the instant case.[763]

From the Courts' judgment surfaces a main guideline of importance with regard to promptness in the context of maritime operations. As a key point 'wholly exceptional circumstances' must exist that necessitates to prolong appearance before a judge. Therefore, there is no use in identifying a maximum of days that will cover the term promptness, but rather specific and exceptional circumstances must exist which materially makes it impossible to bring an individual before a judge. Case law suggests that factors as place of detention (far away from the territory of a detaining State),[764] weather conditions, the State and capabilities of the vessel all play a role whether exceptional circumstances exist. From *Medvedyev* another guideline can be found in which the Court stated that it could not find indications that France did anything that would unnecessarily take more time than needed. Interestingly, the Court also indicated in *Medvedyev* that it was not for the Court to assess whether France had other means to make

[762] In these cases persons where held respectively 16 (*Rigopoulos*) and 13 (*Medvedyev*) days on board the vessel.
[763] *Rigopoulos*, in "The law"-section.
[764] E.g. *Hassan*, paragraph 97.

the process go faster. Bodini concludes from this there is no *obligation* rising out of case law to transfer pirate suspect to other faster vessels or to airplanes in order to get the individuals before a judge.[765] In assessing promptness, the Court seems to make a separation between the situations at sea and the moment individuals arrive on the territory of the detaining State. At sea it seems to except the circumstances and limitations of the capabilities at hand (e.g. a vessel that needs to sail 500 miles to Spanish territory), whereas at the moment the detainee arrives on the territory of the State itself, the Court does not except any excuses anymore and orders nothing else than immediately, without any delay, taking into account that he individuals have already been detained for a significant period whilst at sea.[766] As happened in the *Hassan*-case, therefore, a two days period[767] to get Hassan and others from the plane in France before a judge without any justification proved to be a violation of the obligation of promptness in Article 5(3) ECHR.

In other instances during counter-piracy operations off the coast of Somalia the issue of promptness has lead the decision to release pirate suspects. In recent multinational counter-piracy operations the legal challenges start with the un-ability to find a State that would want to prosecute pirate-suspects. More political ideas, such as that pirate suspects should be tried regionally or that a State has a policy to only prosecute a pirate when there are national interests at stake (for instance that there were nationals on board or the vessel belonged to a certain State) hampers prompt criminal prosecution. But also legally, as the former NATO legal advisor Peter Olson mentions; 'The reluctance for States in Ocean Shield to try persons for piracy…[…]…derives largely from the perceived risk that prosecution will fail due to procedural or evidentiary failures following from the operational circumstances in which they were detained'.[768] The EU-Council Joint Action (CJA) 2008/851/CFSP, in Article 12 states that:

> '…persons having committed, or suspected of having committed, acts of piracy or armed robbery in Somali territorial waters or on the high seas, who are arrest-

[765] S.P. Bodini, 'Fighting piracy under the European Convention on Human Rights', in *EJIL*, vol. 22 no. 3 (2011), 829-848, 833.
[766] *Hassan*, paragraph 104.
[767] From 23 September to 25 September 2008.
[768] Olson (2014), 189.

> ed and detained, with a view to their prosecution, and property used to carry out such acts, shall be transferred:
> — to the competent authorities of the flag Member State or of the third State participating in the operation, which took them captive, or
> — if this State cannot, or does not wish to, exercise its jurisdiction, to a Member States or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.

The process to find a State that wants to prosecute takes time. And if it takes too long, human rights law safeguards will necessitate releasing the detained persons. One such example is the *BBC Togo*-incident in 2009, where the captured pirate-suspects were held on board the Netherlands warship *Hr. Ms. Evertsen* during participation in operation *Atalanta*. 13 persons suspected of attacking the Antigua and Barbados flagged *BBC Togo* and a Yemeni dhow were captured some 150 nautical miles from the coast of Oman. The Dutch prosecuting office decided not to prosecute because of a lack of Dutch interests, after which the EU took over the efforts to find a State that would prosecute. Ultimately, after about two weeks in which several States were approached, the persons were released as no State was willing to take up prosecution in a national court.[769]

11.7. Detention in UN-mandated maritime interception operations

The fact that a maritime interception operation is mandated by the UN Security Council does not automatically also create any legal regime or grounds for detention. Operational detention within UN-mandated MIO must be viewed along the lines of the applicable legal regime as elaborated upon in this chapter. In UN-maritime embargo operations the main focus has always been with prohibited items so that detention of persons has never gotten to the foreground of attention. Only in SC-Res 1973 (Libya) did the Council State that mercenaries could be halted also,[770] which was the first time that individuals have been explicitly subject to an embargo operation. This implies that in order to enforce such an authority a person may be detained. More often, however, during embargo operations, per-

[769] See more elaborately on this case, P. Verkroost and M.D. Fink, 'Juridische aspecten van de Nederlandse deelname aan anti-piraterij operaties rondom de Hoorn van Afrika', in *MRT*, vol 104, no. 1 (2011), 9-26; kamerstukken II, no. 29 521, 131, 7 January 2010, *Antwoorden op kamervragen van de leden Haverkamp, Knops (beiden CDA) en Peters (Groen links) over de vrijlating van Somalische piraten.*
[770] SC-Res. 1973 (2011), paragraph 13.

sons are only seen in the context of a possible threat to the boarding team. As mentioned above, whether one can actually speak of detention or whether the crew of the vessel is temporarily restricted in movement depends on factors such as duration, manner, effects and consent. Typical ROE in UN-mandated maritime embargo operations to enforce UN sanctions do not per definition also include detention ROE. Rather, it focuses on the vessel and its goods and authorizes for instance seizure of the goods or diversion of the vessel. Even so, one of the procedures of a boarding team to make sure that the crew of the vessel does not hamper or endanger the inspections and to ensure a level of control, crew and passengers that are not essential to operate the vessel are assembled as much as possible to an area during the search for a better control and observance of the crew and passengers.[771] Interestingly, NATO's *ATP 71* (2005), on tactical MIO-procedures has nothing particular on detention of persons. It has, however, recognized in its rephrased definition of MIO (see Chapter 1) that also persons can be the focus of MIO. Other than that UN-mandated maritime embargo operations that can be considered as part of the wider ongoing international armed conflict between the enforcing State and the targeted State opens to the door to PW-status, the activities of an embargo operation by itself will usually not pass the threshold of an armed conflict.

One particular point to note in the context of detention during UN-mandated MIO is the phrase *all necessary means.* Arguably, such wording in the resolution may provide an implied legal ground to detain for security reasons. Practice to that effect is found in the ISAF-operation in Afghanistan, was argued as a legal ground for detention during NATO operations in Kosovo (KFOR)[772] and is also sought as an implied ground for detention during counter-piracy operations. ICJ Judge Greenwood is quoted in the *Serdar Mohammed v. ministry of Defence*-case[773] to have said in this context:

[771] See for example the practical 'to do'-list of the boarding team in *ATP* 71, p. 5-15. (e) Place a security team member in position above the assembled crew/passengers to observe the entire group, if possible. Furthermore, the ATP 71 notes that one of the principles of crew control is to 'keep the crew together'.
[772] See e.g. T. Davidson, K Gibson, ,'Experts meeting on security detention report', in *Case Western Reserve University School of Law*, vol. 40 (2008), 323-380.
[773] *Serdar Mohammed v. ministry of Defence*, High Court of Justice, Queen's Bench Division, 2 May 2014.

> That (or very similar) language has been employed by the UNSC when it wished to authorise the use of force and it was plainly intended to carry such a connotation in Afghanistan. It would be wholly illogical for the authorisation to extend to the use of lethal force against persons but not to include their detention.[774]

Others point out that in order for *all necessary means* to be a legal ground for detention, it must adhere to the principle of legal certainty. The ECtHR stated on this principle in the *Medvedyev*-case:

> 80. The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail.[775]

The qualitative and procedural requirements of detention must therefore be sufficiently defined, which in an *all necessary means* mandate as a legal ground is a challenge. Within the context of MIO, the multinational counter-piracy operations off the coast of Somalia may serve as an example. The counter-piracy operations based on a combination of UNCLOS, domestic laws and UN-resolutions. Petrig mentions that with regard to detention that a number of States[776] within the EU-operation *Atalanta* in fact have two different moments which need to be separated. The first moment is the capture and detention of the individuals and the second is the decision of a prosecutor to start criminal proceedings.[777] This separation, Petrig argues, is also needed in some States because the military are not authorized under the national criminal proceedings codes to act

[774] *Serdar Mohammed*, paragraph 218.
[775] *Medvedyev*, paragraph 80.
[776] Petrig has studied the cases of Denmark and Germany, but also The Netherlands appears to have this view. See Verkroost & Fink (2011), 21-22.
[777] A. Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of piracy suspects* (2014).

against criminal acts. The legal basis for the first moment of detention is sought in Article 105 UNCLOS and the applicable resolution itself, which includes the *all necessary means* phrase.[778] As Article 105 does not apply in the territorial waters of Somalia, the only legal basis for that area is the extant resolution. Once a State's prosecutor decides to criminally prosecute the persons, they will come under the domestic criminal law proceedings and thus also the safeguard and treatment of domestic laws. Petrig has casted some doubt, however, over the question whether the *all necessary means* phrase by itself is sufficiently clear to meet the qualitative and procedural requirements of Article 5 ECHR. The rule must be sufficiently clear on what will happen after the moment of detention. As article 105 UNCLOS by itself does not hold any procedural text, and *all necessary means* does is not substantively sufficiently clear on rules and procedures of detention either, she argues that both cannot hold as a sufficient legal ground for detention.[779] This is not a wholly illogical view in light of the *Medvedyev*-case, where the diplomatic note was not sufficiently clear ("take legal action") to contain a sufficiently clear legal ground for detention and its subsequent procedures.[780] With regard to Article 105 this view is shared by Pierini, who states:

> In my view, Article 105 of UNCLOS and the provision that the apprehending State "may" apply its laws, though not obliged to do so, represents an intrinsically contradictory element, weakening the assertion that article 105 provides itself legal certainty as to the existence of a cause for detention. The authorization vis-à-vis other States to capture pirate vessels and its crew and to apply its own criminal laws needs to be supported by proper and adequate provisions under domestic law in order to grant legal certainty. [781]

In my own view, Article 105 UNCLOS may be sufficient enough, firstly in terms of that it explicitly mentions the possibility of arrest and further-

[778] See e.g. SC-Res. 1846 (2008)
[779] Petrig (2014), 228-230.
[780] *Medvedyev*, paragraph 99. See also on this point D. Guilfoyle, 'Current Legal Developments European Court of Human Rights. Mevedyev and Others v. France, European Court of Human Rights', in *The International Journal of Marine and Coastal Law* vol. 25 (2010), 437–442.
[781] J.P. Pierini,'Apprehension, arrest, detention and transfer of suspected pirates and armed robbers within the legal framework of the European Security and Defence Policy (ESDP): The "mantra" of the existence of a proper legal base', in *I Quaderni europei* (March 2011), 1-10, 8.

more that the system of laws imposes that the details of the arrest and detention are meant to be filled by domestic legislation, and not dealt with on the level of international law. It does imply, however, that a State should have such legislation.

With regard to *all necessary means*, in December 2014, the ECtHR in the *Hassan*-case viewed that UN-resolution 1816, which included the *all necessary means*-phrase, under the circumstances might be construed as the legal basis for detention, but (at that time) lacked rules with regard to the conditions of deprivation of liberty imposed on the captured persons pending appearance before a court.[782] It, therefore, did not meet the qualitative requirement for a sufficient legal basis. As the resolution also explicitly emphasize the application of human rights, an *all necessary means* mandate cannot be used to sidestep human rights obligations based on article 103 UN-Charter.[783]

11.8. The *Freedom Flotilla* incident

As a last point in this chapter, the *Mavi Marmara* incident of May 2010 is interesting to note in the context of detention. The incident has some interesting points with regard to the relationship between to human rights law at sea and the application of the law of naval warfare, which is at this stage a completely uncharted area. As Eliav Lieblich has noted: "It is common knowledge, among those dealing with the nitty-gritty of IHL, that the process known as the "humanization of international humanitarian law" –as famously put by Theodor Meron– has generally not trickled to the law on maritime warfare. Prize law is perhaps a key example for this phenomenon".[784] Interestingly, in this incident the issues dealt with go beyond the level of capturing ships and also deals with individuals on board during a boarding which purpose was to enforce the law of blockade. The incident is also interesting because apart from being recent practice, it was subject to several investigative reports. The three most important ones[785] are the report from the Human Right Committee (HRC),[786]

[782] *Hassan*, paragraph 69.
[783] See also Guilfoyle (2010a), 152.
[784] E. Lieblich, 'Yet Another Front in Israeli/Palestinian Lawfare–International Prize Law', at: *Opinio Juris*, 13 January 2014. http://opiniojuris.org/2014/01/13/lieblich-guest-post-yet-another-front-israelipalestinian-lawfare-international-prize-law/.
[785] Another report was written by Turkish national authorities.

the report from the Israeli committee (Turkel-report)[787], and the report written in assignment of the UN Secretary-General (Palmer report)[788]. All the reports have noted the application of both the law of naval warfare and human rights law and all have taken an interest in the detention issue that emerged from the capturing of the vessels. In short, the *Freedom Flotilla*-incident involved the following situtaion: while in international waters, the six vessels of so called *Freedom Flotilla* were hailed and warned by the Israeli Defence Forces (IDF) not to sail any further as they would breach the Israeli blockade of Gaza. When the vessels did proceed, the IDF boarded the vessels in order to take control over them. During their boarding of the vessels, one of which was the *Mavi Marmara*, they were met with resistance by the persons on board. The subsequent struggle on board between the IDF and the persons on board resulted in nine dead passengers and a number of wounded persons. The struggle ended in the IDF gaining control over the vessel and persons. Captured vessels and the persons on board were taken to the Israeli port of Ashdod. The HRC-report mentions that during this phase approximately 700 persons, passengers and crew from six vesels althother, were detained, up to 12 hours, and a number of persons were handcuffed.[789] In Israel the persons were transferred to a detention facility.[790] Immediately after the capture of the *Freedom Flotilla*, the UN-Security Council (UNSC) requested the release of the vessels and persons on board the *Freedom Flotilla* vessels.[791] Several States called for the same through national statements. The persons that were on board were ultimately released.

With regard to the detention of persons on board the vessels, the reports have several things to say. The Palmer-report discusses the treatment of detained persons on board and during their stay in detention on land.[792] It

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[786] A/HRC/51/21, *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance* (27 September 2010).
[787] *The Public Commission to Examine the Maritime Incident of 31 May 2010* (Turkel Commission). The Turkel Commission in fact produced also a second report. This second report (Part II) relates to *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* (February 2013).
[788] *Report of the Secretary-General's Panel of inquiry on the 31 May 2010 Flotilla incident* (September 2011).
[789] HRC, para 176. Turkel (para 164) mentions the same the number of persons.
[790] HRC, para's 195-196.
[791] S/PRST/2010/9.
[792] Palmer, para 135-145.

also discusses the general legal framework to include both LOAC, and the law of naval warfare in particular, and human rights law. According to the *Panel of Inquiry* the latter regime applied, 'once the enforcing State of a blockade asserts physical control over the vessels and its passengers, regardless of the ship's position on the high seas'.[793] Here, the report accepts that during the belligerent blockade both the law of naval warfare and human rights law co-existed. The report, however, does not tie this to the issue of detention and whether grounds for any kind of detention on board could be found in either LOAC or human rights law. The Palmer-report, therefore, stays in the dark on the exact legal grounds for detention of the civilians on board.

The HRC-report takes the view that, in general, the conduct on board the *Mavi Marmara* is also subject to human rights law during the blockade operations.[794] In concluding, however, that the blockade is unlawful because in the view of the HRC it inflicts disproportionate damage to the civilian population[795], the HRC states the following on the legal basis for detention:

> 215. As stated above, Article 9, paragraph 1, of the International Covenant on Civil and Political Rights guards against arbitrary arrest or detention. Since the Israeli interception of the flotilla was unlawful, the detention of the passengers and crew from the seven vessels at Ashdod was also prima facie unlawful since there was no legal basis for the Israeli authorities to have detained and transported these people to Israel. The passengers found themselves in Israel on the basis of an unlawful act by the State of Israel. The Israeli authorities were therefore under an obligation to deal with these people in accordance with their international human rights obligations.[796]

Different than the Palmer-report, the HRC takes the view that the blockade itself was unlawful and concludes that firstly, no legal ground existed

[793] Palmer, conclusion para 69.
[794] HRC, para 70.
[795] HRC, para 52-56. Interstingly, the HRC applies section 102(b) of the *San Remo Manual*. While the HRC is satisfied that the blockade impacts on a disproportionate manner on the civilian pupulation, the Turkel-report finds it hard to conclude whether or not this is actually the case, also in light of the landcrossings-policy imposed on the Gaza. In fact it concludes that the blockade was in compliance with the proportionality requirement as it is written in the San Remo Manual. Turkel, para's 62 and 97.
[796] HRC, para 215.

for detention based on the law of naval warfare. Secondly, any detention and treatment of persons must be viewed within the context of human rights law. Thirdly, it goes on to conclude that the detention within the context of human rights law was unlawful since there was no legal basis.

The Turkel Commission first takes the approach that the blockade was lawfully established.[797] Secondly, in discussing the applicability of human rights law, it concludes that, although it might be the case, the *lex specialis* of the law of armed conflict applied in this particular circumstance.[798] It also questions whether the IDF had effective control over the vessels before they had control over the bridge and subsequent cessation of resistance.[799] Turkel, therefore, accepts co-existance of both legal regimes, and in this particular case LOAC as the *lex speciails* applied and persons on board should be regarded within the context of the law of armed conflict. The report has categorized the passengers, who are in essence civilians, in those who took direct part in hostilities (DPH) and those did not.[800] The report mentions that if force were to be used against the latter group persons, the use of force was based on human right law standards of necessity and proportionality.[801] It appears to conclude that using force against the civilians on board that did not rise against the military boarding team must not be considered as hostilities, but as an action of law enforcement. Furthermore, the report notes that: "some of the flotilla participants were handcuffed, mainly young men who the forces were concerned would try to attack them or to cause a disturbance."[802] It also states that: '195 passengers were under the supervision of members of this unit and were not handcuffed, and that only the "people with fighting potential" were handcuffed'.[803] This would signify that persons were detained for security purposes. When arrived in Ashdod port the report does not seem to State that there is any difference in processing the persons, whether DPH or security detainee. Each participant of the flotilla underwent the same process and arrest warrants were issued to each participant.[804] After the process, the report states that:

[797] Turkel, para 112.
[798] Turkel, para 99.
[799] Turkel, para 186.
[800] Turkel, para 190.
[801] Turkel, para191.
[802] Turkel, page 177.
[803] Turkel, para 144.
[804] Turkel, page 187.

> Forty-five flotilla participants requested immediate deportation from the territory of the State of Israel, and thus they were escorted directly from the Ashdod port to Ben-Gurion airport by the Nachshon unit of the Prison Service, those persons that represented a potential security threat and others.[805]

Others, who rose against the military, were put under criminal investigation, until diplomatic pressure urged them to be released. After the request of the UNSC, to avoid any more diplomatic issues, the Israeli Attorney-General recommended to stop any legal proceedings against participants who had acted against the Israeli military, who subsequently decided to release those participants.

What can at least be concluded from the reports is the notion that the law of naval warfare and human rights law can co-exist during and armed conflict. It can also be concluded that there may in fact be situations were belligerent are ascertaining there rights under the law of naval warfare and where human rights law may play a complementary role. Interesting is also that different investigative bodies arrive to different conclusions. The Turkel-report is the most detailed and submits that some persons were detained based on LOAC and others were dealt with through human rights standards. The *Freedom Flotilla* situation is a good example in which circumstances may arise that persons must be detained for security reasons. As noted in this chapter, there is neither an explicit ground for security detention in LOAC, nor in IHRL on the high seas. As the vessels belonged to neutral States, the only implied legal ground left would have been to accept that the law of naval warfare in ascertaining these rights implies also an authority to detain.

11.9. Final remarks

This final chapter of Part III has analysed detention at sea within the context of maritime interception operations. As the introduction of this chapter noted, individuals are now more in the centre of attention in the maritime dimension. It has been submitted here that the capture of a vessel

[805] Turkel, para 153.

does not, in principle, mean that the persons on board are automatically detained. Whether persons are detained will still depend on the specific circumstances of the case. In terms of legal grounds for detention at sea, it appears that there are lesser explicit grounds to detain on the high seas, as GCIV does not directly apply to the maritime environment. Applying the rules of occupation law to vessels on the high seas may partly close this gap, but only for vessels that fly the flag of the occupied territory. Furthermore, the same challenge of (a lack of) an existing legal ground for security detention in an extraterritorial NIAC applies at sea. An *all necessary means*-mandate may provide a legal basis for detention during MIO, but needs to meet the principle of legal certainty. Qualitative and procedural requirements of a sufficient legal basis must however be fulfilled. Some authors have argued that an *all necessary means*-mandate, therefore, may not be sufficient to provide such legal basis for detention. Finally, the *Freedom Flotilla* incident is a good example of the complexity of operational detention on the high seas. The incident, underlines that that although the law of naval warfare does not concern itself with individuals on board, it may be necessary to look beyond the hull of the vessel and deal separately with individuals on board. It furthermore, underlines that discussion on co-existing legal regimes can arise also in the maritime dimension. And lastly, it underlines that the need for security detention exists also on the high seas, during maritime interception operations.

PART IV:
SYNTHESIS & CONCLUSIONS

CHAPTER 12

Synthesis and conclusions:

Legal challenges to MIO in modern conflict

States may use their navies to demonstrate and enforce their perception of the proper law of the sea. If such naval operations are consistent, effective and accepted, customary international law of the sea may develop. But if such naval operations are inconsistent, ineffective, or resisted, chaos may result.

Mark W. Janis – Sea Power and the Law of the Sea[806]

12. Introduction

I used Mark Janis' quote already in the introduction to underline the quest I was embarking on to discover the legal aspects of maritime interception operations. My aim was, through the study of practice and available literature, to provide some structure and identify challenges in MIO as regards the application of international law applicable to maritime interception in the context of international peace and security. Furthermore, it was also to add to the academic debate and to contribute to effectiveness of military operations by providing warship commanders and other practitioners through a structural analysis of law and practice a better understanding of at times a complex legal environment in which maritime interception operations take place. The central focus of this study has been the examination of the international legal frameworks applicable to naval operations conducting a maritime interception role outside the sovereign jurisdiction of States and in the context of international peace and security. This has been studied by analysing the generally accepted legal bases for MIO, and

[806] Janis (1976), 75.

by analysing in the context of legal regimes, three topics central to MIO, namely the right of visit, the use of force and detention.

12.1. Overall reflections: gains and challenges

Before summing-up the conclusions from the preceding chapters, as a syntheses I will start with some overall reflections. These reflections may, in broad terms, be summed up in the following three separate but not separable points. The first is the evolution of maritime interception operations from a legal notion to a term of naval-operational art. Second are the challenges that non-international armed conflict bring to maritime interception operations. And third is a focus on human beings in contemporary maritime interceptions and the legal effect that this focus brings with it.

12.1.1. The evolution of MIO

It can be concluded that over the past twenty-five years, through operational experience and academic thought, a relatively clear structure has emerged with regard to the legal bases for MIO that are also generally accepted and used by States and academics, and which are also familiar to military operators. The view that the term MIO is only strictly limited to UN-mandated maritime embargo operations is clearly behind us. Using the term, however, to include interceptions based on the law of armed conflict is not entirely an accepted way forward. Today, maritime interception operations are a well-known, much exercised and used tasking in the naval community. Although on an operational level maritime interception may be exercised much in a similar manner, its legal parameters will differ based on the applicable legal bases and regimes. Although the international legal framework for legal bases applicable to MIO is now relatively clear, points of contention related to these bases have also emerged, which raises discussions on the exact scope and authority of these different applicable legal bases. Examples that were discussed are the issue of master or flag state consent and the question of when the UNSC has authorized maritime enforcement measures. While these issues have emerged and indeed new issues have been added, such as the issue of how self-defence might serve as a legal basis for conducting a maritime interception operation against WMD, interestingly, the evolution of maritime strategy has also put new light the acceptability of some issues. A chang-

ing maritime strategy in the last ten years to enhancing maritime security, for instance, has put the ability to board under master's consent authority in a much more acceptable daylight as this a concept that makes operating at sea to enhance maritime awareness and security more workable. The focus on piracy, to name another example, has put the issues of the relationship between human rights law and the law of the sea more to the foreground.

12.1.2. Non-international armed conflict at sea

The fact that current conflict today can often be characterized as non-international armed conflict conducted by non-state actors has not left the maritime dimension untouched. One challenge in this respect is that the authorities of the law of naval warfare derived from economic warfare and maritime neutrality, such as the belligerent right of visit and search, do not apply in non-international armed conflict. Dealing with modern conflict at sea, therefore, appears to have a legal gap. As a result, maritime interception operations that are conducted during non-international armed conflict and against non-state actors do not stand out with much legal clarity and have also given rise to *modus operandi* or theoretical argumentation that may be legally debatable. Three of such examples are the practice friendly approaches, the arguments raised to board foreign vessels on the high seas suspected of carrying WMD based on self-defence and the use of statelessness to intervene on vessels. This thesis has argued that in the context of modern conflict at sea, it would make sense to also look into concepts that may considered to be too far-reaching today, such as a NIAC-right of visit. Arguably, however, such concept may in the end be more legal than trying to push existing rules over the edge into abuse of the rule.

1.2.1.3. Human beings

One other point that clearly stands out from twenty-five years of evolution of maritime interception operations, is the expanding focus on individuals, besides vessels and goods. One reason is the focus on enhancing maritime security which puts the human being into a central spot during maritime interceptions. Another important reason is the greater acceptance of extra-territorial applicability of human rights law, and its subsequent practice in,

for instance, counter-piracy operations. The focus on human beings and the broader scope of application of human rights law has firmly introduced human rights law within the realm of maritime interception operations. A focus on human beings and also more regular deployments in situations that do not amount to an armed conflict, has put more attention to analyse *modus operandi* of warships from a law enforcement perspective where it turns to the use of force and detention. If one would accept the extraterritorial application of human rights law to situations at sea, it may also mean that one could accept that the use of force standards that have crystallized over the years and through law of the sea jurisprudence and international agreements related to the sea are in fact the application of human rights law standards at sea. One particular area where academic thought and practice is extremely meagre is the question how co-existing legal regimes would relate in situations where both the law of naval warfare and human rights law exist. Be that as it may, today it is clear that human rights law also has a role to play in maritime interception operations.

In sum, maritime interception operations cannot be approached solely from the law of the sea perspective or from the vantage point of the UN-collective security system. It is generally accepted that the legal bases and regimes applicable to MIO now encompass the whole spectrum of international legal frameworks -bases and regimes- applicable to military operations. In other words, the international law that relates to maritime interception operations has over the last twenty-five years matured by firstly embracing the whole spectrum of general international law as applicable to military operations in the maritime dimension, and where it necessitates more in-depth legal specificities have emerged to better apply the law into the maritime dimension.

12.2. Legal bases for MIO

Part II has analysed the legal bases that are generally accepted to serve as a legal ground for maritime interception operations. With regard to legal bases for MIO, it may be concluded that an evolution has taken place in which in the start of the use of the term the legal basis was very much connected with the UN-collective security system. Gradually, MIO has evolved into an operational term to define an activity at sea which can be

based on different legal bases. Practice and theory have generally accepted that MIO can be based on the UN collective security system, self-defence and consent, either *ad hoc* or through international agreements. Basically, these legal bases follow the general international law of accepted legal bases for the use of military force. While these legal bases for MIO are not contested, the scopes in which the legal bases are applied do have several points of discussion.

With regard to the legal basis of the UN-collective security system it can be said that the practice of UN-mandated maritime interception operations has evolved into a fully accepted notion that the UNSC can authorize military enforcement measures at sea to enforce sanctions. Over the last twenty-five years, the UNSC has made use of this authority which on the one hand has crystallized into typical wording that signals the authority to enforce sanctions at sea, but on the other hand also created embargo operations through other kind of language, more specifically tailored for the conflict and situation at hand, such as in the cases of Lebanon and Libya. Whereas the heart of the UNSC decision to authorize naval assets to implement economic sanctions at sea lies with Article 41 of the UN-Charter, the justification and authority to act with military means to enforce implemented sanctions is more closely related to Article 42 of the Charter.

Self-defence can also be a ground for MIO. Firstly, invoking self-defence can be the start of a situation of an international armed conflict during which boarding operations may take place based on the legal regime of the law of armed conflict, the law of naval warfare in particular. Secondly, self-defence is also argued against single actions threats, such as seaborne WMD, and non-state actors. With regard to WMD self-defence is argued in an anticipatory manner, in which the requirement of immediacy is interpreted in such a way that it primarily focuses on the gravity of the possible act. The key-difference is that in the traditional approach self-defence is a condition that allows for to application of the law of armed conflict. LOAC -*ius in bello*- then provides the right to board vessels, albeit limited to international armed conflicts. In the other approach, related to NSA and WMD, the right to board a foreign flagged vessel is derived from the *ius ad bellum* itself, which brings unique argumentation into play, such as the argument that the use of self-defence is not dependent on other States, which, connected to the debate on the con-

ditions to cross borders in a NIAC, leads to the view that NSA can, under certain conditions, can be attacked beyond the attacked state's borders in other States, and thus on foreign flagged vessels in the maritime dimension. With regard to non-state actors, self-defence is argued to circumvent the legal challenge that no belligerent right of visit is currently generally accepted in non-international armed conflict. In this view, the right of self-defence and the view that it is not dependent of the will of other States, is balanced against the situation in which States are unable or unwilling to act against non-state actors.

The central point of discussion related to the basis of *ad hoc* consent is the master or flag state consent issue. This thesis submits that the answer to the issue very much depends on two key considerations. The first is the position the flag State takes with regard to boarding its flagged vessels. The second is the actual activities that a boarding team will conduct once they are aboard the vessel. The second consideration, therefore, does not completely discharge the possibility that there are situations that foreign vessels can be visited by a warship based on master's consent. At this point a very thin line exists between activities that may be regarded as enforcing State authority through its military, which lies primarily with the flag State, or whether it does not pass this threshold. In this perspective, a boarding at the invitation of the master would be allowable, but once the boarding team conducts any activity that may be deemed as a law enforcement activity it has surpassed its authority. In this context, the practice of the 'friendly approach' or AAV-visits to communicate with and help the fellow mariner's at sea adds to view that master's consent has been gaining more support in the operational arena.

As a last, the instrument of international agreements as a legal basis for MIO has since 9/11 also been more often used as a tool to enhance the possibility to use maritime interception. In particular, the 2005 SUA-Protocol and the bilateral agreements between the US and other States or of note. Although debates are raised, mainly to underline that the traditional freedom of navigation is eroded by these agreements, it is generally accepted that international agreements can serve as a basis for MIO. When one considers the content of the agreements, exclusive jurisdiction of a flag State over its flagged vessel still stands, however, as the legal point of departure. The authorities of the boarding State are strict and limited and mainly focused on procedural authorities that ensure timely reaction to a

threat on board another vessel. In other words, the flag State has not lost jurisdictional grip on its vessels and persons on board once it explicitly, or implicitly by the passing of time, approves a boarding.

An overall conclusion that be noted with regard to legal bases for MIO, is that it is also possible that a MIO is based on more than one legal basis. Counter-piracy operations off the coast of Somalia are framed both in UN-resolutions to the extent that it concerns operating in the territorial waters of Somalia, in consent from the (Somali) authorities to operate within the territorial sea of Somalia and also in the law of piracy that is codified in UNCLOS.[807] Another example is the maritime embargo operations off the coast of Lebanon conducted by MTF UNIFIL, which is set-up through a combination of a UN-resolution and consent by the Lebanon authorities.

12.3. Legal regimes in MIO

Part III has studied three specific activities central to maritime interception operations, namely the right of visit, the use of force during MIO and detention at sea, in the context of applicable legal regimes. A general conclusion that can be drawn is that through both the current focus on enhancing maritime security and the acceptance of extraterritorial applicability, human rights law has firmly introduced itself within the realm of maritime interception operations. This conclusion might be an open door at this stage of the debate on legal aspects of MIO, but it certainly was not the case when MIO surfaced as a means to deal with international peace and security. The obvious consequence is that the relationship between IHRL, LOAC and the international law of the sea becomes an important issue in establishing what authority the military may have during maritime interception operations. Especially on the subjects of the use of force and detention at sea the legal parameters during MIO are very much affected by human rights law. Whereas the international law of the sea and the law of naval warfare mainly focus on vessels and goods, the attention of human rights now urges to look beyond the hull of the ship and get more concerned with the persons on board. Guilfoyle commented with regard to legal grounds for detention in the *Medvedyev*-case that, 'One might wonder how it is possible that the note granted authority to detain a vessel on

[807] Treves (2009), 406-408.

the high seas, but not those aboard it'.[808] This is exactly the thinking-gap that lies between the vessel-focused law of the sea and the person focused-human rights law. The applicability of human rights law effects both the issue of the use of force and detention.

A second general conclusion that can be drawn from Part III is that the challenge that is brought upon the maritime dimension with the extension of non-international armed conflicts to sea has particular impact on the right of visit. Chapter 9 has underlined firstly that there are more rights of visit then the traditional peacetime and belligerent rights of visit, when one approaches this subject from general international law. The scope, purpose and content differ per rights of visit. It is therefore that commanders must keep them apart, especially in situations where they are tasked with more roles that involve the use of several rights of visit. Some of the rights are detailed as they are part of either international agreements or its details have been widely accepted in customary international law, such as the belligerent right of visit and search. Others are less clear and must either be detailed in the State's consent that waivers the flag State authority, or must be interpreted through actual texts of UN-resolutions. Also with regard to visits, a challenge lies in the fact that contemporary conflicts are more often characterized as non-international armed conflicts. Whereas international armed conflict provide a detailed right of visit, it is still viewed that this does not apply in NIAC-situations. It is quite imaginable that it is operationally unsatisfying that existing naval rules to conflict do not fit current conflict in the sense that the means is not available to effectively act against non-state actors at sea. Legal solutions to what seems to be a gap have been suggested, through the argument of a self-defence or a NIAC right of visit. In this approach the legal basis for the actual boarding of the vessel is regulated by the *ius ad bellum* and the scope of the boarding authorities by NIAC-regulations or self-defence itself.

From these two general conclusions -Applicability of human rights law to maritime interception operations and the existence of a legal gap with regard to MIO that are performed in NIAC operations - a number of subsequent conclusions can be drawn.

[808] D. Guilfoyle, 'Current legal developments European Court of Human Rights', in *The international Journal of Marine and Coastal Law*, vol. 25 (2010), 437-442, 440.

The first subsequent conclusion regards the rights of visit. Chapter 9 has analysed the different existing rights of visit. The challenge that non-international armed conflicts or non-state actors pose to MIO has developed into creative thoughts to fill the gap made by the fact that that traditional rights of visit do not suffice in NIAC-situations at sea. There may a view which can be called 'self-defence right of visit ' or a 'NIAC-right of visit'. In this view the right to board and undertake subsequent actions on board are brought within the context of the *ius ad bellum* in competition with sovereignty, rather than that it is derived from the *ius in bello*, the law of naval warfare in particular. This development of thought, however, does not do any justice to the basic framework of international law that starts with keeping basis and regime apart.

The second subsequent conclusion concerns the use of force. The manner in which force can be applied depends on the applicable legal regime, IHRL or LOAC. Both legal regimes have their own conditions for application, which also means that the question of whether IHRL or LOAC applies is a separate consideration. IHRL in the context of using force, however, only comes to the foreground were individual's lives are in fact at stake. During the phase were force is used against the vessel IHRL is not of particular importance. Rather this phase is regulated by the views on the use of force that have emerged from either international law of the sea or from the law of naval warfare.

The third and last subsequent conclusion deals with detention, dealt with in Chapter 11. Detention has become much more important in maritime interception operations than in the "old days" when MIO where only considered to be UN-mandated maritime embargo operations to enforce UN-sanctions at sea. Academic literature of how operational detention is applied in the maritime dimension has only started since the last few years, mainly as a result of counter-piracy operations. In terms of legal grounds for detention at sea, it appears that there are lesser explicit grounds to detain on the high seas, as GCIV does not directly apply to the maritime environment. Applying the rules of occupation law to vessels on the high seas may partly close this gap, but only for vessels that fly the flag of the occupied territory. Furthermore, the same challenge of (a lack of) an existing legal ground for security detention in an extraterritorial NIAC applies at sea. An all necessary means-mandate may provide a legal basis for detention during MIO, but needs to meet the principle of legal

certainty. Qualitative and procedural requirements of a sufficient legal basis must however be fulfilled. Some authors have argued that an all necessary means-mandate, therefore, may not be sufficient to provide such legal basis for detention. As a last, the Freedom Flotilla incident is a good example of the complexity of operational detention on the high seas. The incident, underlines that that although the law of naval warfare does not concern itself with individuals on board, it may be necessary to look beyond the hull of the vessel and deal separately with individuals on board. It furthermore, underlines that discussion on co-existing legal regimes can arise also in the maritime dimension. And lastly, it underlines that the need for security detention exists also on the high seas, during maritime interception operations.

12.4. Final remarks

The laws applicable to naval operations have always been regarded as a sort of a special thing in international law, with specialized lawyers speaking the secret language of the international law of the sea, and sometimes even its highly incomprehensible dialect of the law of naval warfare. There is nothing, however, that suggests that the law applicable to the maritime dimension can close its eyes to the developments and discussions that are raging on the mainland with regard to the application of more fields of international law to conflict, their interrelationships and the character of conflict. The maritime dimension of military operations must, in a similar fashion, be eager to embrace these debates on how the developments in the laws applicable to military operations in general, apply at sea. The question of what non-international armed conflict does to naval operations in the legal context and the more and more accepted application of human rights law at sea will remain a legal focus point in the development of the law of naval operations.

Glancing at the matrix that I mentioned in the first sentence of the introduction, on board *Hr. Ms. De Zeven Proviciën*, and looking both back and forward, undoubtedly, the various rules applicable to military operations at sea will certainly not make operating for military operators much easier. After a study of the scope and content of the international law applicable to maritime interception operations, one can at least argue that these frameworks have grown and their interaction has become more

complex. As a legal advisor of the Royal Netherlands Navy, I would like to end here with a quote from the Netherlands Commander in Chief of the Naval Forces during the Second World War, Admiral J. Th. Furstner[809], who at the outbreak of the war commented on the distinction that must be made with regard to the law of naval warfare at sea and in the courtroom. He stated:

> 'De prijsrechter zelf blijft uiteraard steeds de instantie, die eventueel noodzakelijke correcties op de maatregelen der Commandanten aanbrengt. Het is echter van het grootste belang de procedure in open zee zoo eenvoudig mogelijk te maken'.[810]

This quote can be translated as: "Obviously, the prize judge will remain the one that, if need be, will correct the measures taken by commanders. It is, however, of the greatest importance that procedures at sea stay as simple as they can possibly be." In a general sense, I take from his opinion that the law applicable to naval operations must be *workable* for naval operators at sea. Now, 75 years later, the challenge put to naval officers to adhere, understand, and work with the law applicable to naval operations have not become easier. Quite on the contrary, rather. I sincerely hope that some of what I have written here on the one hand provides something of a feeling to the academic arena on how challenging the task for at sea can be, but also will help practitioners in their, at times, daunting task to find their way through the legal challenges which may come upon their path, whilst being confronted with the many, many other challenges the members of the Armed Forces need to endure in military operations.

[809] 1887-1970. In the Netherlands the highest military naval rank an officer can achieve is lieutenant-admiral, which is a 4-star admiral. The rank of 'admiral', which comes after lieutenant-admiral, is privileged for the King of the Netherlands.
[810] Letter of the Netherlands Commander of the Naval Forces, J. Th. Furstner to the Minister of Defence, London 17 September 1940, no. S. 200/27/3. *National Archives, Londense Archief*, GA/JUZA, no. 1328.

Summary

This study examines the international law applicable to maritime interception operations (MIO). In particular, it addresses the legal bases and legal regimes that can apply to MIO. The study is limited to maritime interception operations that are conducted within the context of peace and security, outside the sovereign waters of a State and MIO that occured after the Cold War. The aim of the study was to add to academic theory and debate on maritime interception operations and to developed some structure on MIO for military practitioners.

The study contains four parts. The first part decibes the general framework in which maritime interception operations are performed today. It underlines a few typical aspects of MIO, describes briefly the contemporary history of the evolution of MIO en discusses fundamental principles of the law of the sea that are relevant to maritime interception. The second part studies the generally accepted legal bases for MIO. The third part studies the applicable legal regimes (the law armed conflict and international human rights law) within the context of three activities that are a core to maritime interception operations: the right of visit, the use of force and detentions. The last and fourth part contains the synthesis and conclusions.

Part I (general framework)
The general framwork underlines that maritime interception operations are today an accepted and important role for naval forces. The current focus on enhancing maritime security, in which MIO play an operational part in, underlines on the one hand the importance of MIO, but on the other hand also shows the tension that exists with regard to the underlying principles of the international law of the sea. Next to the overall strategic evolution the role of naval forces, the term MIO itself has been subject to evolution. The core of the evolution is that the term MIO has grown from primarily maritime embargo operations in the context of the collective security sys-

tem to become a term without a legal connotation, but rather a term of operational art. This evolution allows for the notion that maritime interception can be based on several legal bases.

Part II (rechtsbases)
The second part analyses the four generally accepted legal bases for maritime interception operations. These are: the UN-collective security system, self-defence, (ad hoc) consent and international agreements. Next to a description on how these legal bases can be a ground for MIO, the chapters also analyse the discussions that have emerged with applying the respective bases to MIO. With regard to the collective security system attention is paid to how MIO can be placed within the collective security system. Debate on the use of self-defence for MIO comes in particular to the forground when used in the context of single threats, such as vessels suspected of being loaded with weapons of mass destruction. The chapter on (*ad hoc*) consent adresses also the debate on master en flag state consent. The last chapter deals with some international agreements that are relevant to MIO, such as UNCLOS, and SUA.

Part III (legal regimes)
Central to Part III are legal regimes. The applicablity of LOAC and IHRL is studied through three activities that are relevant for MIO; the right of visit, the use of force and detention at sea.This part starts with, in Chapter 9, with the different manifestations of the right of visit. On the one hand, the more traditional visit-rights that flow from the international law of the sea and the law of naval warfare. On the other hand, the non-traditional legal visit-options, such as through *ad hoc* consent or self-defence. Challenges in this area exist where visits are conducted during non-international armed conflicts. Because this part of the law of armed conflict, which includes the belligerent right of visit and serach, does not apply to these conflicts, such conflicts lack the legal possibility through the *ius in bello* to board a foreign flagged vessels. Chapter 10 deals with the use of force during a MIO. Today, it is more and more accepted that firstly human rights law also can be applicable during operations at sea and continues to stay applicable during armed conflict. There has been little attention paid to the question of the interaction between the law of naval warfare and human rights law. The final chapter in this Part disusses the

question of detention at sea on the basis of these two bodies of law. The chapter deals with how the subcategories of operatonal detainees (prisoners of war, security detainees and criminal detainees) are legally dealt with in the maritime dimension, since against the background of a larger focus on enhancing maritime security and a law enforcement role of naval forces, the individual and the possible detention of the individual now play a greater role during MIO, next to the capture of goods and vessels. Human beings come with human rights and the questions which legal regime applies to the detention. At this stage jurisprudence and academic debate has arisen from which guidelines can be distilled how to apply human rights law at sea.

Part IV: Synthesis and conclusions

The fourth Part contains the synthesis and conclusions of this study. It firstly briefly reflects on thre overall points: the evolution of the term MIO, the challenges that modern conflict bring to the maritime interception and the increased focus on the individual at sea. Then the conclusions of the former Parts are briefly outlined.

Nederlandse samenvatting

Deze studie bestudeert het internationaal recht dat toepasselijk is op maritieme interceptie operaties (MIO). In het bijzonder gaat deze studie in op de rechtsbases en rechtsregimes die op maritieme interceptie operaties van toepassing kunnen zijn. MIO zijn afgebakend tot interceptie operaties binnen de context van militair optreden ter bevordering van de internationale vrede en veiligheid, optreden buiten de soevereine rechtsmacht van een staat en bovendien optreden dat na de Koude Oorlog heeft plaatsgevonden. Het doel van deze studie is om enerzijds een bijdrage te leveren aan de theorievorming met betrekking tot het recht van maritieme operaties en anderzijds een handvat te zijn voor de militaire praktijk bij de uitvoering van MIO.

Het onderzoek bestaat uit vier delen. Het eerste deel schept het algemene kader waarin maritieme interceptie operaties vandaag de dag plaatsvinden. Dit deel geeft ten eerste een aantal kenmerkende aspecten van maritieme interceptie operaties, beschrijft voorts kort de contemporaine geschiedenis van maritieme interceptie operaties en bespreekt ten slotte de relevante basisbeginselen van het internationaal recht van de zee die voor MIO van belang zijn. Het tweede deel gaat in op de algemeen geaccepteerde rechtsgronden op grond waarvan maritieme interceptie operaties kunnen plaatsvinden. Het derde deel bespreekt de rechtsregimes (humanitair oorlogsrecht en mensenrechten) binnen de context van drie activiteiten, namelijk (het recht van) visitatie, geweldgebruik en detentie, die centraal staan bij maritieme interceptie operaties. Het laatste deel bevat de synthese en conclusies.

Deel I (algemeen deel)
Het algemene deel onderstreept dat maritieme interceptie operaties tegenwoordig een belangrijke en algemeen geaccepteerde rol zijn voor de zeestrijdkrachten. De tegenwoordige focus op het versterken van de maritieme veiligheid *(maritime security),* waarvan de maritieme interceptie-rol een belangrijke operationeel onderdeel is, onderstreept enerzijds het belang van maritieme interceptie operaties, en zet anderzijds tegelijkertijd enkele fundamentele principes van het recht van de zee onder druk. Naast de strategische evolutie als reactie op de mondiale politieke ontwikkelingen van de inzet van zeestrijdkrachten richting een MIO-rol, is ook de term MIO zelf aan een evolutie onderhevig geweest. Belangrijk daarin is op te merken dat de term verbreed is van een term met juridische connotatie (in de context van VN-gemandateerde embargo operaties) naar een term die in feite gezien moet worden als een technische term, *zonder* juridische connotatie. Deze evolutie opent op zichzelf weer de mogelijkheid tot de gedachte dat verschillende juridische grondslagen kunnen bestaan voor de inzet van maritieme interceptie operaties.

Deel II (rechtsbases)
Het tweede deel bestudeert vier algemeen geaccepteerde rechtsgronden voor maritieme interceptie operaties. Dit zijn: het collectieve veiligheidssysteem van de Verenigde Naties, het recht van zelfverdediging, toestemming door staten en internationale overeenkomsten. Naast de wijze waarop deze vier rechtsbases een rechtsgrond kunnen zijn voor MIO, worden per rechtsbasis de discussies geanalyseerd die bestaan ten aanzien van de afzonderlijke rechtsgronden. Met betrekking tot VN-gemandateerde interceptie operaties (Hoofdstuk 5) is aandacht besteed aan de vraag op welke grondslag binnen het collectieve veiligheidssysteem een interceptie operatie kan plaatsvinden. De discussie met betrekking tot het gebruik van het recht van zelfverdediging in MIO, komt met name naar voren met betrekking tot de vraag hoe het recht van zelfverdediging een rechtsgrond voor MIO kan zijn in gevallen waarin een schip beladen met massavernietigingswapens als individuele dreiging wordt beschouwd. In het hoofdstuk over (*ad hoc)* toestemming staat de controverse rondom *master* en *flag state consent* centraal. Het laatste hoofdstuk (8) in dit deel gaat in op internationale overeenkomsten die als basis kunnen dienen voor maritieme interceptie operaties, waaronder het VN-Zeerechtverdrag, het

SUA-verdrag en de *bilateral boarding agreements* (BSA) tussen de VS en andere staten.

Deel III (rechtsregimes)

In het derde deel staan rechtsregimes centraal. De toepasselijkheid van de rechtsregimes humanitair oorlogsrecht en mensenrechten wordt besproken aan de hand van drie onderwerpen die van belang zijn voor maritieme interceptie operaties. Het recht van visitatie, het gebruik van geweld en detentie op zee. Hoofdstuk 9 beschrijft de verschillende verschijningsvormen van het recht van visitatie. Enerzijds bestaan de traditionele visitatierechten die voortvloeien uit het internationaal recht van de zee, het humanitair oorlogsrecht en het zeeoorlogsrecht in het bijzonder. Anderzijds bestaat ook visitatierecht op basis van niet-traditionele visitatierechten, zoals een visitatierecht dat ontstaat door *ad hoc* toestemming of door gebruik te maken van het recht op zelfverdediging. Een uitdaging voor het recht van visitatie vormen niet-internationaal gewapende conflicten. Omdat het zeeoorlogsrecht niet toepasselijk is op niet-internationaal gewapende conflicten voorziet het (zee)oorlogsrecht in tegenwoordige, doorgaans niet-internationale conflicten niet in een juridische mogelijkheid om een vreemd schip kunnen visiteren. Hoofdstuk 10 gaat in op de wijze waarop tijdens een MIO gebruik kan worden gemaakt van geweld. Het is tegenwoordig alom geaccepteerd dat ook in de maritieme dimensie rekening moet worden gehouden met de toepassing van mensenrechten. Tegelijkertijd is tevens de heersende opinie dat tijdens gewapende conflicten de mensenrechten van toepassing blijven. De vraag is hoe deze twee rechtsregimes in de maritieme dimensie interacteren. Ten slotte wordt in het derde hoofdstuk (11) van het derde deel detentie op zee besproken. Het hoofdstuk gaat in op de wijze waarop de drie subverdelingen van *operational detention* (PW, *security detention* en *criminal detention*) in de maritieme context kunnen worden toegepast. Detentie op zee is binnen de context van MIO van steeds groter belang geworden omdat MIO steeds vaker wordt ingezet in een rechtshandhavende rol, waarin niet het schip of de goederen aan boord centraal staan, maar de individuen aan boord. Zonder meer gaat het vastnemen van personen gepaard met de vraag welk rechtsregime van toepassing is. Inmiddels bestaat steeds meer jurisprudentie door het Europees Hof van de Rechten van de Mens (EHRM) en aca-

demisch debat waaruit richtlijnen voor het beschermen van de mensenrechten op zee kunnen worden gedestilleerd.

Deel IV: Synthese en conclusies
Het vierde deel bestaat uit de conclusies en de synthese van deze studie. Het staat ten eerste stil bij drie overkoepelende reflecties: de evolutie van de term MIO, de uitdaging van moderne conflicten voor MIO en het centraal stellen van het indivudu in maritieme interceptie operaties. Vervolgens wordt ingegaan op de conclusies van de drie voorgaande delen.

ANNEX A: List of vessels

Vessel name	Date	Flag State	Boarded by	Action
-Achille Lauro	1985	Italy	PLO	sailed to Egypt
-Al Feddah	2010	unknown	The Netherlands	pirates detained & tried
-Artic Sunrise	2013	The Netherlands	Russia	vessel and persons detained
-Asama Maru	1940	Japan	UK	21 German nationals taken off board
-Barber Perseus	1986	UK	Iran	released after inspec tion
-BBC China	2003	Germany	-	diverted to Italy
-BBC Togo	2009	Antigua & Barbados	pirates	pirates released after capture
-Borndiep	2004	The Netherlands	-	denied access to Portu gal territorial sea
-Bozkourt	1926	Turkey	-	collided with ss Lotus
-Caroline	1834	United States	UK/Canada	burned vessel, killed 2
-Estelle	2012	Finland	Israel	Captured, brought before prize court
-Francop	2009	Antigua and Barbado	Israel	detained vessel and cargo
-Heng Chung Hai	1990	China	US	released after inspec tion
-Ibn Khaldoon	1991	Iraq	US	diverted after boarding
-I'm Alone	1929	Canada	-	intentionally sunk by US coastguard
-Joanna V	1966	Greece	UK	refused to divert after boarding
-Kater I Rades	1997	Albania	Italy	Sunk after collision with Italian vessel
-Klos C	2014	Panama	Israel	Captured, brought into Israeli port
-Lido II	1994	Malta	The Netherlands	diverted to Brindisi, Italy,
-Light	2011	Belize	-	turned back to North Korea
-Limburg	2000	France	-	attacked by small boat
-Lotus	1926	France	-	collided with Bozkourt
-Karine-A	2002	Tonga	Israel	detained vessel and cargo
-Maersk Alabama	2009	US	US	pirate detained, tried in US
-Mavi Marmara	2010	Comoros	Israel	captured vessels
-Morning Glory	2014	Stateless	US	stopped and returned to Libya
-Ponant	2007	France	Somali pirates	pirates captured on land
-Red Crusader	1961	British	Denmark	fired upon by *Niels Ebbesen*
-Saiga	1997	St. Vincent & Grenadines	Guinea	vessel and crew detained
-Samanyolu	2009	Netherlands Antilles	Denmark	detained pirates, tried in NLD

-Santa Catharina	1603	Portuguese	The Netherlands	captured vessel and cargo
-Sea Isle City	1987	US reflagged	-	damaged by missile attack
-So San	2001	Cambodia	Spain,	US released after in spection
-Taipan	2010	Germany	The Netherlands	pirates detained, tried in Germany
-USS Cole	2000	US	-	small boat attack
-USS Samuel B. Roberts	1988	US	-	struck by mines
-Winner	2002	Cambodia	France	detained vessel and persons

ANNEX B: List of incidents

For ease of reference, this annex contains an alphabetical (by ship's name) list of most important incidents used throughout the book with a short description of the incident.

Achille Lauro
In October 1985, the Italian flagged *Achillo Lauro* was hijacked by Palestinians off the coast of Egypt, demanding the release of 50 Palestine prisoners. The hijackers were given safe passage in Egypt and were allowed to board an airplane to fly to Tunisia. US fighters then forced the plane to land in Italy. The case prompted discussion on the legal possibilities to intervene on foreign flagged vessels in case or terrorist actions on board the vessel. As a result, the SUA-Convention was drafted.

Al Feddah
In 2009, Netherlands Royal Marines from *Hr.Ms. Tromp* in a rhib got fired upon when approaching a dhow that also held Iranian hostages. Their reaction led to the death of two hostage takers and the capture of pirates that were subsequently tried and sentenced in the Netherlands. The case went all the way up to the Supreme Court of the Netherlands (Hoge Raad der Nederlanden), which in 2015 judged that the commander of the warship *Hr.Ms. Tromp* had a legal ground to arrest the pirates and the Netherlands did not breach Article 5 ECHR.

Arctic Sunrise
In 2013, The Netherlands flagged vessel *Arctic Sunrise* was used by Greenpeace as a mothership, which sent its rhibs to demonstrate on the Russian oil platform Prirazlomnaya, in the Russian EEZ. The ship was captured by the Russian authorities and taken with its crew to Russia to stand trial. The Netherlands argued before the ITLOS and the PCA that the boarding of the vessel was unlawful. The PCA considered that the boarding was indeed unlawful as the boarding did not comply to all the elements of an hot pursuit.

Barber Perseus
In January 1986, during the Iran-Iraq War, the UK flagged vessel *Barber Perseus* was boarded by Iranian warships some miles outside the Iranian territorial waters. It caused a discussion in the UK parliament on the right of self-defence and the belligerent right of visit.

BBC China
In 2003, The German flagged vessel *BBC China* carried centrifuge parts for the Libyan nuclear program. The vessel was ordered by Germany to divert to the Italian port Taranto in Southern Italy, where U.S. agents boarded the vessel for a search.

BBC Togo

In 2009, the Netherlands warship *Hr. Ms. Evertsen* during participation in operation *Atalanta* captured 13 pirate-suspects who were held on board the warship. They were suspected of attacking the Antigua and Barbados flagged *BBC Togo* and a Yemeni dhow and were captured some 150 nautical miles from the coast of Oman. The Dutch prosecuting office decided not to prosecute because of a lack of Dutch interests, after which the EU took over the efforts to find a State that would prosecute. Ultimately, after about two weeks in which several States were approached, the persons were released as no State was willing to take up prosecution in a national court.

Borndiep

In 2004, the Netherlands flagged *Borndiep*, a floating medical facilty from the *Women on Waves* organization that aimed at undertaking abortions, was not allowed into Portuguese territorial waters. Warships were send to obstruct the passage into the territorial waters of Portugal. The issue came before the ECHR.

C.E. Thornton

In 2000 Suriname threatened to use force by means of two gunboats of the Suriname Navy to expel the vessel *C.E. Thornton* which was in service of Guyana from the disputed area. (Guyana vs. Suriname, Award of the Arbitral tribunal constituted pursuant to article 287, and in accordance with annex vii, of the united nations convention on the law of the sea, 17 September 2007.)

Estelle

In 2012, the Finnish vessel Estelle tried to run the Gaza-blockade established by Israel. It was captured by Israel and was brought before an Israeli prize court.

Francop

On 3 November 2009, Israel boarded the *MV Francop*, which sailed under the flag of Antigua and Barbuda. It found more than 300 tons of weapons on board, according to Israel said to be meant for Hezbollah. The vessel was directed to Ashdod Port for further examination. The weapons shipment was said to originated from Iran. In a letter to the UNSG Israel stated that the shipment constituted a breach of SC-Res. 1747 and because of: "The intended route of the Francop - coupled with the types of weaponry found on board - raise serious concerns that this incident also constitutes a violation of UN Security Council Resolution 1701 and 1373."

Ibn Khaldoon

The *Ibn Khaldoon* was a merchant vessel, dubbed the "peace-ship", that sailed in 1990 from Algeria to Iraq, enroute to Basra, during the MIF-period. The *Khaldoon*, similar as the *Mavi Marmara*, had protestors, congressmen and women on

board and purposely attracted a lot of media attention. After helicopter insertion of the US boarding team passive resistance occurred by the passengers to try to stop the boarding team to take control of the vessel. The boarding team used smoke grenades to control the vessel. After the boardingteam discovered prohibited items on board a port needed to be found to offload the prohibited cargo. Ultimately the cargo was offloaded in Oman.

I'm Alone

The Canadian flagged vessel *I'm Alone* was sunk in March 1929 in hot pursuit on the high seas in the Gulf of Mexico, by the US coast guard cutter Dexter, whilst it was engaged in prohibited liquor trafficking.

Joanna V

The Greek tanker Joanna V was boarded by the UK warship *H.M.S. Berwick* on 4 April 1966, after which it refused to divert from the port of Beira, without the UK being able to do something about it. After the incident the UNSC took measures that involved the authority to arrest the *Joanna V* upon departure and to stop vessels breaching the embargo going into Beira.

Karina-A

In 2002, the Israeli Defense Force boarded the Tonga flagged vessel *Karine-A* in the Red Sea. The vessel carried 50 tons of weapons, suspected to be for the Palestine authority.

Kater-I-rader

The Albanian flagged *Kater I rader* was carrying Albanian refugees when it was pursued by the Italian warship *Sibilia.* The ships collided and caused the Albanian vessel to sink. It case was put before the ECtHR was considered to be inadmissible.

Klos-C

In March 2014, Israel boarded the Panama-flagged *Klos-C* on suspicion of carrying a large bulk of weapons (surface-to-surface rockets) in the Red Sea on its way to Sudan, ultimately destined for the Gaza in an operation codenamed operation *Full Disclosure*. According to the foreign minister of Israel, it had obtained permission from Panama to board the vessel. The vessel was diverted to Eilat and the crew members, according to an Israeli spokesman, who were probably not aware of the cargo were released.

Lido II

In 1994, the Maltese flagged vessel *Lido II* left Tunisia to sail for Croatia, with mainly petroleum products as its cargo. After a first inspection by NATO/WEU forces while entering the Adriatic, it proceeded on its way to Croatia. The *Lido II* however changed course to the Albanian port of Durazzo, while repeating re-

quests for assistance as the vessel started to take water into the engine room. The master then changed course again towards Montenegro, which was off limits under the SC-Res. 820 mandate. Dutch forces were inserted by helicopter to take over the vessel before it entered the territorial waters of Montenegro. The *Lido II* was towed to Brindisi, Italy, to be dealt with by the Italian authorities.

MV Light
The Belize flagged vessel *MV Light* from North-Korea on its way to Myanmar and suspected of carrying missile parts was forced to turn back by the US who dispatched the *USS McCampbell* to intercept the *M/V Light*. Although authority to board was given by Belize, based on the US-Belize shipboarding agreement the master refused. Instead it finally turned back to North Korea.

SS Lotus (Bozkourt)
The Turkish vessel *Bozkourt* and the French flagged mail boat *SS Lotus* collided on 2 August 1926 on the high seas. Eight persons on board the *Bozkourt* died because of the collision. The Turkish Government prosecuted the French first officer Demons of the *Lotus* for his share in the incident. The question whether Turkey could have jurisdiction over Demons was put before the PICJ. The Court ruled that there was no rule in international law that prohibited Turkey from prosecuting the French lieutenant.

MV Maersk Alabama
In April 2009, the United States boarded the US flagged vessel *Mearsk Alabama.* The vessel was hijacked by pirates. The pirates were tried in the US. The story of the captain (Philips) of the *Maersk Alabama* was made into a movie.

Mavi Marmara
In May 2010, Israel boarded the *Mavi Marmara* and six other vessel who were part of the so called *Freedom Flotilla*, who attempted to breach the blockade off the coast of the Gaza. The IDF boarded the vessels. The boarding turned into an opposed boarding situation and the subsequent fight between the boarding party and the attackers resulted in nine dead persons and a number of wounded. The vessels and persons on board were taken to Israel, after which, ultimately, the persons were released.The incident led to several national and international committees to examen the incident.

Morning Glory
On 17 March 2014, US Navy Seals operating from *USS Roosevelt* stopped and boarded the *Morning Glory* in international waters in the vicinity of Cyprus. The vessel was said to be stateless and tried to sell crude oil with a tanker that was stolen earlier. The vessel was escorted back by *USS Stout* to the Libyan port of Es Sidra.

Ponant
In 2007, the French flagged vessel Ponant was hijacked by Somali pirates. The French authorities pursued and arrested the pirates on Somali territory. The incident came before the ECtHR (Samatar vs France 2014).

Red Crusader
In 1961 the Danish fisheries inspection vessel *Niels Ebbesen* boarded the British flagged vessel *Red Crusader* and arrested the crew on suspicion of fishing with a prohibited area. After initially cooperating to follow the *Niels Ebbessen* to the Faroe Islands, it stopped cooperating to follow the *Ebbesen* and secluded the Danish officers that were still on board. The *Ebbessen* than first fired warning shots upon the Red Crusader, hailed it to stop and then proceeded to fire for effect at the *Red Crusader*. The commission of inquiry concluded that firing upon the *Red crusader* was not justified and that other means should have been sought to pursue arrest. (Permanent Court of Arbitration (PCA), 23 March 1962.)

MV Saiga
The oil tanker *MV Saiga* was attacked and boarded by Guinean officials in 1997. The vessel and persons were brought to Conakry and placed under arrest. The ITOs found that Guinea under the specific circumstances of the case used excessive force against the MV Saiga, which was fully loaded with fuel, was unarmed and travelling at a speed of 10 knots. MV Saiga no. 2 (Saint Vincent and the Grenadines vs. Guinea, ITLOS Judgment 1 July 1999).

Samanyolu
In January 2009, The Netherlands-Antilles flagged Samanyulo was hijacked by pirates. The Danish warship *Absalon* boarded and freed the vessel. The pirates were ultimately handed over to the Netherlands and were tried before the district court of Rotterdam, The Netherlands.

So San
In December 2002, the vessel *So San* was suspected of carrying scud-missiles from North Korea to Yemen. After the boarding by Spanish forces from the Spanish warship *Navarra* upon request of the US this suspicion proved to be true. The name So San was freshly painted on the stern while no name was registered under that name in North Korea. According to Roach after being queried, the master of the vessel replied that it was registered in Cambodia. The Cambodian authorities appeared to have confirmed that a vessel meeting the description was registered in Cambodia, but under the name of *Pan Hope* instead of *So San*. No legal ground was, however, found to seize the scuds. Nothing prohibited North Korea to ship scuds to Yemen. The So San was released to proceed to Yemen with its original cargo still aboard.

Taipan
On 19 October 2012, the district court in Hamburg sentenced ten Somali pirates that had hijacked the German flagged vessel *Taipan*. The pirates were detained

after a Netherlands boarding team from *Hr. Ms. Tromp* boarded the vessel by fast-roping from a helicopter in 2010 and detained the pirates.

Winner

In early June 2002, the French authorities requested Cambodia to intercept the Cambodian flagged vessel *Winner* that was suspected of carrying large quantities of drugs. France requested and got the authority via a diplomatic note exchange. Between France and Cambodia. The French warship *Lieutenant de vaisseau Le Henaff* was instructed to intercept the *Winner* and intercepted the *Winner* near the Cape Verde Islands.

ANNEX C: List of naval operations

Name	Date	State/Org	Legal basis
Active Endeavour	2001-present	NATO	Self-defence
Allied Force	1999	NATO	Humanitarian interv.
Allied protector I (Provider)	2008	NATO	UN-mandate/UNCLOS
Allied Protector II	2009	NATO	UN-mandate/UNCLOS
Atalanta (EUNAVFOR)	2009-present	EU	UN-mandate/UNCLOS
Beira Patrol	1966-1975	UK	UN-mandate
Cast Lead	2009-present	Israel	Self-defence
Change of Direction	2006	Israel	Self-defence
Desert Shield	1990	Coalition	UN-Mandate
Desert Storm	1990	Coalition	UN-mandate
Enduring Freedom	2001-present	Coalition	Self-defence
Full disclosure	2014	Israel	(ad hoc) consent
Iraqi Freedom	2003	Coalition	UN-mandate (disputed)
Maritime Interception Force	1990-2003	Coalition	UN-Mandate
Maritime Guard	1992-1993	NATO	(NAC-decision)
Maritime Monitor	1992	NATO	(NAC-decision)
Maritime Taskforce UNIFIL	2006-present	UN	UN-mandate
Ocean Shield	2009-present	NATO	UN-mandate/UNCLOS
Oddysee Dawn	2011	Coalition	UN-mandate
Sharp Fence	1992-1993	WEU	-
Sharp Guard	1993-1996	NATO/WEU	UN-mandate
Sharp Vigilance	1992-1992	WEU	-
Unified Protector	2011	NATO	UN-mandate
United Nations Korea	1950-1953	Coalition	UN-mandate

ANNEX D: Table of UN-mandated maritime embargo operations

	Conflict	Operation alias	Duration of operation	Organization	Resolutions
1	Southern-Rhodesia	Operation London (Beira Patrol)	1966 - 1975	UK	217 (1965) 221 (1966) 232 (1966)
2	Iraq	Multinational interception Force (MIF)	25 August 1990 – 2003	Coalition	661 (1990) 665 (1990)
3	Former-Yugoslavia	Maritime Monitor	16 July – 22 November 1992	NATO	713 (1991) 757 (1992)
		Maritime Guard	22 November 1992 – 15 June 1993	NATO	787 (1992)
		Sharp Guard	15 June 1993 - 1 October 1996	NATO / WEU	787 (1992) 820 (1993)
		Sharp Vigilance	July 1992 - November 1992	WEU	713 (1991) 757 (1992)
		Sharp Fence	November 1992 – June 1993	WEU	787 (1992)
4	Lebanon	Maritime Taskforce UNIFIL	August 2006-present	UN	1701(2006)
5	Haïti	Restore / uphold democracy	1995- 1995	(US-led) coalition	875 (1993) 940 (1994)
6	Sierra Leone	-	October 1997-2010	ECOMOG	1132 (1997)
7	Libya	-Unified Protector (OUP)	March 2011 – October 2011	NATO	1970 (2011) 1973 (2011) 2009 (2011)
		- No alias	March 2014 - present	UN-Member States	2146 (2014

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